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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 169, an Unincorporated Association, and MR. HERBERT RAINBOLT; and LOCAL 480, an Unincorporated Association, and MR. JAMES McGUIRE, and TRI-COUNTIES ILLINOIS CARPENTERS DISTRICT COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on January 4, 1972, reversing the decision of the United States District Court for the Eastern District of Illinois.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (App. 1) is reported at 3 FEP 445. The opinion of the Court of Appeals for the Seventh Circuit (App. 23) is reported at 4 FEP 85. The citations of the opinions in the official reporters are unavailable at this date.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1972 (App. 23) and its order denying a petition for rehearing was entered on February 8, 1972. On April 24, 1972, the time within which to file the instant petition was extended to and including June 26, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether a construction union may be engaged in a pattern or practice of resistance to the full enjoyment of the employment rights guaranteed by Title VII of the Civil Rights Act of 1964 because it refuses to cooperate with a plan—intended to implement those rights—to which it is not a party?

STATUTE INVOLVED

The statutory provision involved is Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-6 *et seq.*, which provides as follows:

> "(a) Whenever the Attorney General has reasonable cause to believe that any persons or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights se-

cured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

STATEMENT OF THE CASE

The present case involves a "pattern or practice" suit brought by the Civil Rights Division of the Department of Justice ("Civil Rights Division") against the Tri-Counties Illinois Carpenters District Council of the United Brotherhood of Carpenters and Joiners of America, and its affiliated Locals 169 and 480 ("Carpenters") claiming that the Carpenters had "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured [under Title VII (Section 707(a)) of the Civil Rights Act of 1964, 42 USC Sec. 2000(e)-6 *et seq.*] and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights (under Title VII of said Act)." After an extensive trial, the district court found the Carpenters innocent of engaging in a pattern or practice of racial discrimination under the Act. Despite 22 pages of extensive and detailed findings supporting his decision (App. 1-22), the Court of Appeals reversed the district court not because it found that the district court's findings were clearly erroneous or not supported by the record as a whole but rather, at the re-

quest of the Civil Rights Division found that the Carpenters' admitted refusal to cooperate with a hastily contrived, shallow so-called affirmative action program constituted a violation of the Civil Rights Act, *per se*. As Judge Sprecher stated in the opening sentence of his opinion, "The principal question raised by this appeal is whether a construction union may be engaged in a pattern or practice of resistance to the full enjoyment of the employment rights guaranteed by Title VII of the Civil Rights Act of 1964, because it refuses to cooperate with a plan—intended to implement those rights—to which it is not a party." (App. 23).

This case involves an agreement called the "Ogilvie Plan". In February of 1969 all highway construction was "frozen" in Madison and St. Clair Counties, Illinois with the reason being given as the high cost of construction and alleged discriminatory practices among trade unions. In February 1969, the Governor of the State of Illinois appointed Paul J. Wisner, an attorney, to meet with union groups, contractors and representatives of the Black community. In December, 1969, five men who appointed themselves as spokesmen for the Black community in East St. Louis, Illinois, formed an organization called the "Metro-East Labor Council". An agreement entitled "An Agreement to Facilitate Equal Employment Opportunity in State Highway Construction in Madison and St. Clair Counties" was prepared and this Agreement provided for the signatures of the Metro-East Labor Council, of the contractors and of the union groups involved. The Carpenters had been quite active in affirmative action programs but at the meetings held objected to the terms of the Agreement. Even though no claim had been made that the Carpenters had discriminated be-

cause of race, the Carpenters desired to cooperate and submitted three different specific proposals for additionally providing affirmative action. The proposals of the Carpenters were ignored and at the urging of this new Metro-East Labor Council, the Agreement—ostensibly to be signed by the Carpenters—was summarily and unilaterally adopted. At the trial Wisner admitted that his office made no investigation or analysis of the Carpenters training programs—whether or not they were discriminating against minorities—and that there has been no claim or contention that the Carpenters had discriminated or were engaged in a pattern or practice of exclusion of minorities from the Union. Wisner admitted that the Carpenters' apprenticeship program was certified by the United States Department of Labor and that he knew of no unfair employment practice ever having been brought against the Carpenters or no effort, directly or indirectly, to decertify the apprenticeship program for alleged discrimination. As regards the proposals and plans submitted by the Carpenters, the record does not reflect what happened to the first one; the second one was rejected by the Metro-East Labor Council and the third was not even responded to. Wisner, speaking for Governor Ogilvie's office, testified that he did not dispute the plans submitted by the Carpenters Union but could not "buy it" because Metro-East objected and it wanted **the Plan only** which ultimately became labeled **the "Ogilvie Plan"**.

The Ogilvie Plan, ostensibly a training program for minorities was no training program at all. Rather it was an exposure type program designed to acquaint individuals with construction jobs, to encourage and teach work habits (getting to the job on time, *etc.*) and to preliminarily acquaint the individuals with tool nomenclature. The

program was limited to 12 weeks at the end of which time the individual would be classified as a "Carpenter, Rough" and the person would then be placed on the job and would receive up to 90% of the journeyman's wage and then after a maximum of 200 work days on road construction (assembling concrete forms) he would be classified as a "journeyman . . . receiving a journeyman's wage, and in no way . . . different than any other journeyman." Such individual would then be certified as qualified in all facets of the Carpenter's craft, without limitation. Thus, he would no longer be a "Carpenter, Rough"; he would be a full-fledged journeyman and, under the plan, it would then become the Carpenters' responsibility to find employment for him not on road construction, but in all facets of the craft as a certified journeyman.

As regards carpenters, road construction represents the lowest end of their craft in that very little skill is involved because the basic job is to assemble forms to accept concrete. Moreover, only a small percentage of carpenters' work involves road construction. The Carpenters objected to the Ogilvie Plan because they contended that it would destroy the status of the craft, destroy the apprenticeship program, seriously undermine the collective bargaining agreement and, in terms of affirmative action, delude the minority youths. The Carpenters termed the Plan fraudulent. What would happen to the minority youth when road construction ran out? How could these untrained individuals be placed on any other type of work? And, what would happen to those Black youths who were already participating in training programs which required classroom instruction as well as on the job training and who were content to progress upward in terms of wages until they were legitimately certified

as journeymen, while at the same time learning all facets of the craft and developing the skills required? The Carpenters argued that they had successfully worked with an integrated work force and had had no problems as regards occupational discrimination; that youths—both Black and white—had been trained in all facets of the craft and had learned to work side by side without color distinctions. They agreed that the Ogilvie Plan could represent an additional procurement source for minority youths but if used as a complete substitute for training, the very purpose of utilizing affirmative action to provide employment opportunities would be negated—apprentices, both Black and white, who were learning the craft and participating in the required schooling would become disenchanted because they would be making less than the Ogilvie trainee who attended no school and was pursuing nothing to become qualified. The Ogilvie trainee himself would have been misled because while, for a short period of time, he might be receiving what to him was "good money", when the road job ran out, although he would be certified as a "journeyman" he would not be able to perform the work of the craft. Moreover, since the acceptance of Blacks by the Carpenters had never been a problem, the Carpenters argued that the Ogilvie Plan rather than dispel prejudice, would generate it.

The involvement of the contractors who were part of an employer association known as the Southern Illinois Builders Association was passive and perhaps callous. Highway construction had been frozen. Only a handful of contractors had bid highway work and they wanted the profits generated from the jobs which they had bid. Work generally was poor in the area and there was substantial unemployment. And, the imposition of the Ogilvie Plan came at a time when the Carpenters had been be-

seeching the employers to employ first year apprentices, but the contractors resisted because of the low level of work in progress. The Carpenters had been attempting to have the contractors employ one apprentice to every three journeymen but the contractors had been refusing despite the fact there were apprentices waiting to be employed of which five out of the first nine were Black. The first ranked apprentice was a Black. Yet now, instead of employing the Blacks who were part of the apprenticeship program, the Ogilvie Plan required the employment of Blacks designated by the Metro-East Labor Council. When Harold Gangnath, the Executive Director of the employer association was asked what would happen to an Ogilvie trainee when there no longer was any highway work, he responded "I don't think it is any of my business what happens to them after their training (the 12-week exposure course)", pointing that there certainly would be work in twenty years which would be "for their children." Following the lead of their International Union, the Carpenters have been very active for some period of time in affirmative action programs. In cooperation with Civilian Conservation Centers the International Union was operating job corps programs at 27 different locations including a center at Golconda, Illinois within about 60 miles from the city of East St. Louis. This program was operated in conjunction with the United States Department of Agriculture, Forest Service, the Department of Interior and the Department of Labor to provide a training program relating to the craft of carpentry with specific emphasis upon the unemployed and disadvantaged youth. Under another program operating in 44 states pursuant to a government grant of 2.5 million dollars, the Carpenters International is training unemployed and underemployed minorities and Viet Nam vet-

erans. The Carpenters' Business Representative of Local 169 in his capacity as President of the Building Trades Council which covered all construction unions, including the Carpenters, initiated a federally sponsored and financed program called "Operation Outreach" which was designed to seek out minority youths and to encourage them to apply for admittance into the apprenticeship programs of the various unions. The Carpenters' Business Representative was signatory to the first contract with the government and the contract was renewed and remains in effect, as it was at the time this action was brought.

Although being opposed to the Ogilvie Plan, when Metro-East insisted on their "plan", the Carpenters continued to cooperate and proposed three different plans which embraced the Metro-East Labor Council plan but did not limit training to highway construction only, nor to those areas within the Carpenters' jurisdiction where there was a large Black population. The Carpenters jurisdiction included five counties. While not insisting, the Carpenters suggested that the trainees be employed throughout the entire jurisdiction, as was the case with the other Black members, so that the work force could continue to be integrated without limiting Black employment to black areas only. Moreover, since work had been bad in the city of East St. Louis, by expanding coverage throughout the Carpenters jurisdiction, additional work opportunities would be provided. Although not being wedded to any particular type of a plan, the Carpenters three plans provided for a ratio of one minority trainee to every three journeymen employed, with the Black community (and even the Metro-East Labor Council) participating in the selection of the trainees. The certi-

fied apprenticeship program of the Carpenters was jointly administered by contractor and union representatives with an impartial and objective selection system utilizing the Illinois State Employment Service and approved by the U. S. Department of Labor. It was suggested that the apprenticeship program be expanded and used as a training center for Blacks who perhaps could not meet the scholastic (high school) or age requirements for the apprenticeship program and that the training program credit Blacks with prior experience. At the conclusion of the program, with the required amount of schooling taught through the apprenticeship program and on the job training, Blacks entering this program would become full fledged journeymen. While the mechanics varied in the various plans submitted, the Carpenters proposed that individuals coming through the Ogilvie Plan be given credit for prior work experience (1, 2, 3 or 4 years) and that where they lacked full credit, they would be slotted into the training program at the appropriate level. The slotting was not to be determined by the Carpenters Union but by the Joint Apprenticeship Committee with the participation and supervision of the Department of Labor, Bureau of Apprenticeship and Training and with representatives of the minority community. The Carpenters pointed out that under the Ogilvie Plan, irrespective of the lack of experience of an individual, no schooling was required beyond the initial orientation course; that there were Blacks in the apprenticeship program who, like all other apprentices, were obtaining 144 hours per year of schooling and progressing upward, based upon their prior experience, from 60% of the journeyman wage until they had concluded the program and would receive 100%. An Ogilvie trainee, on

the other hand, was receiving 90% after 12 weeks and shortly thereafter 100% and this Plan, without anything else, would operate as a complete deterrent for a youth to go into the apprenticeship program or the training program. Thus, at the then wage rates an Ogilvie Black at 90% of the scale would be receiving $6.33 an hour while a Black with similar past experience who was attending school under the apprenticeship or training program would be starting out at $4.20 an hour and progressing from there. The Ogilvie trainee, whose exposure was limited to assembling concrete forms only, would be receiving in excess of $7.00 an hour while another Black who already had completed one year of schooling would be receiving under $5.00 an hour.

While the Attorney General had brought suits against other construction unions in the same geographical area alleging substantial past and continuing discrimination and obtained sweeping decrees, the Carpenters were left alone and at no time was there any claim made by the Attorney General that the Carpenters were or had engaged in discrimination. Under the Ogilvie Plan, the particular union involved was to supply an "instructor". The Carpenters refused stating they wanted no part of the Ogilvie Plan and would not supply an instructor, again reaffirming their prior position and emphasizing no insistence upon any particular type of plan, stating that if their plans were not acceptable they would cooperate with any *legitimate* plan. Although the Ogilvie Plan, as drawn, required the signature of the particular union involved, after Metro-East and the contractors signed the Plan, the Plan for carpenters was implemented without the Carpenters approval or signature. By the time suit was filed against the Carpenters they were not asked to

"cooperate" with the Ogilvie Plan, but asked merely not to object. Literally begging that Black apprentices be employed, the contractors, now having signed the Ogilvie Plan, refused to do so but instead one contractor (H. H. Hall) employed an Ogilvie trainee. Ten carpenters (Black and white) then walked off the job in protest against the employment of the Ogilvie trainee instead of a Black apprentice. No picketing occurred. The Carpenters were then asked by the Civil Rights Division—in order to avoid a lawsuit—merely to "order" the men back to work, even though the employer was free to hire carpenters from any source it desired. The Carpenters refused stating that they would withdraw their objection to the Ogilvie Plan and, in fact, cooperate but only if the Ogilvie Plan was used in conjunction with the apprenticeship program or any other training program which would develop journeymen carpenters, not just individuals whose total experience and academic instruction was limited to "rough carpentry"—the assembling of forms for the receipt of concrete. No contention was made that the Carpenters were engaging or had engaged in a pattern or practice of racial discrimination.

The district court issued a temporary restraining order, ab initio, and, in effect, because of the duration of the restraint, the restraining order became a preliminary injunction which was maintained throughout the entire trial. At the conclusion of the trial, after setting a briefing schedule at the request of the Civil Rights Division, the district court refused to continue any restraint stating that although he could be persuaded otherwise when he studied the briefs, in his opinion, the Civil Rights Division had not proven a pattern or practice of racial discrimination—past or present. Under Rule 8 of the Rules

of Appellate Procedure, the Civil Rights Division sought an injunction pending appeal and a different panel (Cause No. 71-1033), than the one which heard the plenary appeal (Case No. 71-1389), after receiving the record designated by the Civil Rights Division and extensive briefs, denied the request for an injunction.

The foregoing represents the basic facts giving rise to the confrontation and the instant "pattern or practice" suit. From the inception, all the Civil Rights Division sought was to have ten carpenters (Black and white) who had walked off a job return to the job on the basis that the Union had "ordered" them to do so. In actuality, the Division believed that if it secured what it termed "temporary relief" (in the trial court or in the Court of Appeals) the entire matter would be disposed of and this would be irrespective of whether or not it had proved a pattern or practice of discrimination or that such a pattern or practice had or did exist. As the district court stated "By this suit the Civil Rights Division of the Justice Department has created a lot of waves without the resulting cleansing of the beaches. It has attempted to force upon these two unions the 'Ogilvie Plan,' which has no force of law and which is not binding on anyone save those parties signatory thereto." (App. 20). The district court was fully aware of the issues presented to him and the legal standards to be utilized. He found that "There is no dispute that the carpenters refused to work with the Ogilvie Plan trainees, but it cannot be successfully contended that the failure of the carpenters to work with the Ogilvie Plan trainees was the result of discrimination on the basis of color, since the number 1 apprentice belonging to the union, waited to be referred to a job, was also black." (App. 20). He found that "At the outset it must be specifically pointed out that none of

the defendant's is a signatory to the Ogilvie Plan and they are not under any obligation under the provisions of the Civil Rights Act, pursuant to which this cause of action is brought, required to cooperate, implement, utilize, or in any way deal with the Ogilvie Plan, *unless it shall first be established that defendants have been guilty of racially discriminatory practices.* Failure to cooperate with the Ogilvie Plan or failure to follow the Ogilvie Plan or failure to work with trainees of the Ogilvie Plan, standing alone and in and of itself, is not sufficient to establish a cause of action under this complaint." (App. 7) (Italics supplied). The Seventh Circuit disagreed with the district court, as can be seen from the question presented—the question in the appeal being stated by the circuit judge who wrote the opinion at the commencement of same.

In the resolution of this matter, the district court did not confine his inquiry to the Ogilvie Plan alone. Neither did he limit his analysis to post-Act conduct, but rather examined all conduct, pre-Act as well as post-Act. Moreover, he looked not only for specific acts of discrimination but also examined every practice, as well, being fully aware that if discriminatory practices existed or the effects of past discrimination were perpetuated, he had plenary power to impose any type of plan he deemed appropriate. In his opinion, he stated that, "It is clear that in the event the Court finds discrimination or evidence of discriminatory practices against Negroes because of their race, then the Court has ample powers to correct the evils in such discriminatory practices by prescribing an appropriate plan to correct the evils attendant to prevent discrimination or to correct the results of past discriminatory practices." (App. 8).

At the time of the trial, Local 169 had an active membership of 445 of which 41 were Black. The Record reflects that the Carpenters did not operate exclusive hiring halls or referral systems but that rather most men procure their own jobs. For the convenience of the contractor, when the contractor desires, the Union refers men out but as regards Local 169, only 20 to 25% of the men availed themselves of this job assistance. As regards Local 480 only about 15% utilize this method. The rest procured their own jobs. And, for those who utilized the assistance of the Carpenters, the Record is clear and the district court found, from the testimony of Blacks as well as whites, that when a job is called out the first man up who wants the particular job receives it. The district court found that Blacks had an equal opportunity with whites to procure the jobs that were called out and that Blacks often procured the jobs before whites, stating that there "was not one scintilla of evidence presented to show that this particular procedure resulted in any racial discrimination" (App. 11). At the time of the trial, there were 30 to 35 persons unemployed—none of whom were Black and all of whom were white. This equality of opportunity did not start at the time of the trial or just before the filing of the lawsuit, but rather the evidence in the Record reflected that at least since 1953—and this was based upon the testimony of Black witnesses—Blacks had an equal opportunity of employment with whites. Blacks and whites worked side by side for Black and white contractors.

The Civil Rights Division introduced statistics from health and welfare and pension records and from this claimed that Blacks worked less hours than whites. The Carpenters, utilizing the same statistics, demonstrated that in actuality Blacks worked more hours than whites

but as regards the statistics, the district court held that "The Government attempted to establish that there has been a disparity of work opportunities afforded between blacks and whites and that the whites have received more favorable treatment in work opportunities than have blacks. The Government attempted to show this by welfare reports, pension plans, and other union records. During the course of the trial it was shown that in many instances the union members who are working do not necessarily appear on any of these rolls; for example, a self-employed carpenter nowhere appears on those particular reports and members working outside the jurisdiction do not appear, members working for an entity which has its own separate welfare and pension plan do not appear. While the Government attempts to show disparity in favor of whites in the area of hours worked, the defendants by utilizing the same facts and figures show a disparity in favor of blacks. Thus, it is quite apparent that the statistical evidence upon which this particular point rests can be afforded little, if any, credibility; because it is so incomplete, it has very little evidentiary value." (App. 9-10). The trial court concluded that "The documentary evidence by which the Government seeks to establish the pattern or practice of discrimination against blacks based on the statistical theory falls far short of establishing such a charge." (App. 19). As the district court noted, "to be of value statistics must relate to the case as a whole, and not be piecemeal. If statistics show the whole picture, they are of much value, but if statistics fail to take into consideration a number of basic facts which must be considered in deciding the case as a whole then such statistics must be weighed in the light of such deficiencies." (App. 21-22).

The Court of Appeals in refusing to affirm the district court, bottomed its decision not upon the facts in the Record but rather upon the dictates of its unsupported conclusion that "Apprenticeship programs in the construction trades have not produced many minority union members, and the record in this case does not furnish any justification whatsoever for interference by the defendants with the Ogilvie Plan." (App. 38). Contrary to the district court and the uncontradicted facts in the Record, the Court of Appeals relied upon bald, unsupported statements of the Civil Rights Division. The apprenticeship situation is completely distorted in the Court of Appeals decision. Illustratively, while the national average of minority participation in building trade apprenticeship programs increased from 6.9% in January, 1969 to 10.8% in July, 1971 (April 12, 1972, report, Manpower Information Service, BNA, pg. 344) it is interesting to note that at the time suit was filed here, in November, 1970, 33% of the apprentices enrolled in the Local 169 program were from minorities. If we include Local 480 (the other defendant in this case) within whose jurisdiction the Black population is less than 1/10th of 1%, the combined total of minority participation in the apprenticeship program in both Defendant Locals was 28.5%. The Record reflects that the apprenticeship system is maintained by a completely objective operation and is jointly administered with an equal number of contractor and union representatives and specifically supervised and directed by the Bureau of Apprenticeship and Training of the Department of Labor, financed in part by continuing federal funds. It is clear (and there was never a contention made to the contrary) that the apprenticeship program is impartially administered in accordance with objective standards. More-

over, the Union in no way controls the number of apprentices that an employer will hire; this is solely up to the employer. As contractors call for apprentices they are sent out in the exact order of placement and each apprentice is advised in writing where he has placed and the placement and the names of the apprentices who are working are posted. Local 169, predominantly involved in this case, had a total of 14 apprentices actually working and enrolled in school, five of whom were Black and one a Spanish-American. But even beyond that there were an additional 41 apprentices on the certified list waiting to be called for work by the contractors at the time that the H. H. Hall Company (the contractor involved) was insisting on employing an Ogilvie trainee. Of these 41 certified individuals, 16 were Black with an undisclosed number of additional persons being from minority groups such as Spanish-Americans, *etc.* The first ranked individual was a Black and five out of the first nine were Black with the sixth being a Spanish-American. The simple fact is that while insisting that one Ogilvie trainee work, the contractors were refusing to call for any apprentices, despite the fact that there were not only Blacks and other minorities waiting to go to work and that the first one on the waiting list was a Black. And the unrefuted testimony of this Black, himself, was that "I feel I have been treated fairly, because no one lower than me has gone out, and I was the first to go out." And going out did not mean going out at the whim of or at the Union's discretion but simply meant going out when a contractor called for an apprentice. Despite a collective bargaining agreement establishing a jointly administered apprenticeship program

supervised by the Department of Labor, the contractors at the badgering of the Metro-East Labor Council, saw fit to ignore their collective bargaining contract and to acquiesce in paying homage by agreeing to the Ogilvie Plan which would have produced nothing but delusion. Moreover, while the Metro-East Labor Council claimed that it spoke for the Black community, this self-styled seizure of power was indeed dubious. Since at least 1955, the Carpenters had worked closely with a Black organization called the Illinois Craftsmen and the Illinois Craftsmen, had been utilized at its request, as one procurement source for Blacks. This organization was still active in affirmative programs and at no point did the Illinois Craftsmen contend that it had experienced any difficulty with the Carpenters as regards obtaining Union membership. Similarly, a Black contractor (Edward Slack), subpoenaed by the Civil Rights Division, who himself had been the Director of a 10 week training program called Project Upgrade, who had been quite active in the civil rights movement, had published a newspaper and had been outspoken as regards equality of opportunity of employment in construction trades, testified that he had no difficulty in procuring membership for Blacks and that based upon his experience, a program like the Ogilvie Plan would not work if that was all that there was—noting that it would represent an excellent procurement source to be tied in to the Carpenters apprenticeship or training program. The Carpenters had no difficulty with Blacks and both the white and Black members readily accepted each other and worked side by side, without incident. They stated that while other

unions may have problems, it was not necessary for the problems of others to be imposed upon them.[1]

The specifics of the Ogilvie Plan claimed that there was a need to have 50 carpenters "indentured" over a period of five years or 10 carpenters per year. The word "indentured" appeared to mean trained, but the Ogilvie Plan provided no further training of any type other than the assembly of forms for concrete. If in fact the real desire was to train 10 persons per year to become carpenters, then such employees could easily have been trained and, of course, this is what the Carpenters' Union was saying—if qualified, make people journeymen or, if not, slot them into either the apprenticeship program or another training program at their appropriate level with the Black community participating in the selection of the apprentices or of the trainees. Out of the 41 certified apprentices ready to be called to work by the contractors, 16 were Black—five out of the first nine were Black and the first was a Black. The Carpenters were not temporizing but seeking genuine and effective solutions as the Carpenters had done throughout the country. Even though they viewed the Metro-East Labor Council as a "rump" organization which did not speak for the bulk of the minority community, the Carpenters nevertheless were willing to use the Metro-East Labor Coun-

1. There are six trades involved in highway construction, the Teamsters, Laborers, Iron Workers, Operating Engineers, Cement Finishers and Carpenters. The Teamsters and Laborers having neither an apprenticeship nor training program acquiesced in the implementation of the Ogilvie Plan. The Iron Workers, Operating Engineers and Cement Finishers having had pattern or practice suits brought against them much earlier alleging substantial past and present discrimination were bound by sweeping decrees entered by the same district court, which, as part of the remedies sought and secured by the Justice Department, included the imposition of the Ogilvie Plan.

cil, along with this Ogilvie Plan, as the source for the procurement of trainees and were ready to have Metro-East actually select those who would come into the program.

And throughout all of this, it is interesting to note that the facts as regards Black membership in the Carpenters (based upon the Civil Rights Division's own exhibits) show that in 1968 and 1969, 42 members were admitted into Local 169, 10 of whom were Black. Approximately, then, 25% of the total membership taken in was Black. In 1970, 23 members were taken in, eight were Black and two Spanish-American—43.5% of the new members were from minorities. And, this was before suit was even filed or contemplated. In 1971, and even though the Carpenters were under no restrain or compulsion, 65 new members were taken in of which 39 were Black and three Spanish-American. Thus 42 out of 65 new members taken in in 1971 were from minorities—or a total of 64.6%. And Blacks were taken into membership since at least 1948.

Thus, this case presents a question whether the Carpenters' Union can be found to have engaged in a pattern or practice of discrimination under the Civil Rights Act because it refused to cooperate with the Ogilvie Plan as the Plan stood. Apart from the Ogilvie Plan, as the trial court held, "It is interesting to note that counsel for the Government stated: 'Just for the record, the government has talked to a lot of people and looked at a lot of documents.' Considering all of the evidence, both documentary and oral testimony, it appears to this court that if there was in fact a pattern or practice and the Government did in fact interview a lot of people and look at a lot of documents, certainly if there did exist a pat-

tern or practice of discrimination, somewhere in the evidence there would have been some factual basis upon which this allegation was based. When the record is considered based on the oral testimony, only two witnesses vaguely testified concerning isolated possible discriminatory statements over a period apparently from 1948 to the time of trial. If there existed a pattern or practice and the Government 'has talked to a lot of people and looked at a lot of documents,' then a great deal more evidence should have been available and presented" (App. 18-19).

ARGUMENT

Within the overall civil rights area concerning construction labor unions, the present case presents an important question of federal law under Title VII of the Civil Rights Act of 1964 which has not been, but which should be settled by this Court, and wherein this Court's guidance and direction is required to minimize crises situations and to effectuate the purposes of the Act. The Court of Appeals, contrary to the district court, held that a construction union is engaged in a pattern or practice of resistance to the full enjoyment of employment rights guaranteed by Title VII of the Civil Rights Act of 1964 because it refuses to cooperate with a "certain plan" as it then stood. The Court of Appeals decision represents a unique and substantial departure from the basic principles in pattern or practice suits. It is clear that policies and practices racially neutral on their face are, nevertheless, unlawful if they tend to perpetuate effects of past discrimination.[2] Evidence of pre-act (Civil Rights

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2. *U. S.* v. *Dillon Supply Co.*, 429 F. 2d 800 (C.A. 4, 1970) (Industrial plant case involving discriminatory promotions and transfers in racially segregated lines. District Court erroneously excluded evidence of any discrimination prior to the filing of the lawsuit in 1967); *U. S.* v. *Local 38, IBEW*, 428 F. 2d 144 (C.A. 6, 1970) (Construction union case discussed, *infra*); *Local 53, Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (C.A. 5, 1969) (Same); *U. S.* v. *Local 36, Sheet Metal Workers*, 416 F. 2d 123 (C.A. 8, 1969) (Same); *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D., Ohio, 1968) (Same); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10, 1970) *cert. denied*, 401 U.S. 954 (1971), (No-transfer policy prohibiting city drivers from transferring to over the road drivers discrimination prior to Act was perpetuated); *U. S.* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977 (D.C. N.Y., 1970) *aff'd*, 446 F. 2d 652 (C.A. 2, 1971) (Job seniority of all white department froze people in positions thus prohibiting Blacks from obtaining preferable jobs. Employer admitted pre-Act discrimination); *Local 189, United Papermakers* v. *U. S.*, 416 F. 2d 980

Act of 1964) conduct is admissible to attempt to prove that present policies perpetuate the effects of past discrimination.[3] When a union is all white, it is unlawful to limit information with regards to membership or apprenticeship to whites only.[4] It is unlawful to recruit whites while making no efforts to recruit Blacks.[5] In industrial plants, job seniority as distinguished from overall plant seniority, may be discriminatory particularly if it perpetuates past racially discriminatory practices.[6]

(C.A. 5, 1969) *cert. denied*, 397 U.S. 919 (1970) (Separate white and Black locals. Until 1964 there were separate lines of progression for whites and Blacks with Blacks receiving the lower paying jobs. Subsequently, the promotional progression lines were merged but on the basis of existing pay rates which resulted in Blacks taking the lower rated jobs and with promotions continuing to be based on job seniority which continued to prefer whites over Blacks. The job seniority systems carried forward discriminatory effects of its former segregation practices).

3. *U. S.* v. *Local 86, Ironworkers*, 315 F. Supp. 1202 (W.D. Wash., 1970) *aff'd*, 443 F. 2d 544 (C.A. 9, 1971); *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio. 1968).

4. *U. S.* v. *Local 86, Ironworkers*, fn. 3, *supra*.

whites while making no efforts to recruit Blacks.[5] In in-

5. *U. S.* v. *Local 36, Sheet Metal Workers; Dobbins* v. *Local 212, IBEW*, both cited fn. 2, *supra* and *U. S.* v. *Local 86, Ironworkers*, cited fn. 3, *supra*.

6. These cases generally involve admissions of acts which if continued subsequent to the passage of the Civil Rights Act would be violations. The contention in these cases was that the pre-Act discrimination had ceased but the courts generally found perpetuation of the effects of past discrimination. They basically involve seniority systems within the plants. See, *U. S.* v. *Hayes International Corporation*, 415 F. 2d 1038 (C.A. 5, 1969); *U. S.* v. *National Lead Co.*, 315 F. Supp. 912 (E.D. Mo., 1970), *aff'd* 438 F. 2d 935 (C.A. 8, 1971) (No violation found because seniority was "bona fide"); *U. S.* v. *H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala., 1968) (Basically no violation found); *U. S.* v. *Jacksonville Terminal Co. et al.*, 316 F. Supp. 567 (M.D. Fla., 1970) *aff'd in part*, —— F. 2d —— (C.A. 5, 1971). See also cases cited fn. 2, *supra*: *U. S.* v. *Dillon Supply*; *U. S.* v. *Bethlehem Steel Corp.*; and *Local 189, Papermakers* v. *U. S.*

Preference in work referrals or in union membership to relatives of members of a union which has only white members may constitute a violation of the Act.[7] But the Court of Appeals for the Seventh Circuit tells us now that a handful of "leaders" of a Black community (here the Metro East Labor Council in East St. Louis, Illinois) with the help of the Civil Rights Division can not only impose a particular type of a plan but find anyone with a different point of view to be guilty of a pattern or practice of racial discrimination. And since the activities of the Civil Rights Division are neither regional nor limited to any particular circuit, the impact of the instant decision is indeed frightening. Apart from the instant case, there are six construction union cases under the Act in which trials have been completed and Court of Appeals decisions rendered.[8] In all six cases, as distinguished from here, there was an exclusive hiring hall where hiring could only be had through the union. In five of the six cases, the exclusive hiring hall was contractual and in

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7. *U. S.* v. *Local 86, Ironworkers, et al.*, 315 F. Supp. 1202 (W.D. Wash., 1970) *aff'd* 443 F. 2d 544 (C.A. 9, 1971) (Automatic preference given to sons and relatives of union members); *U. S.* v. *Local 73, Plumbers*, 314 F. Supp. 160 (S.D. Ind., 1969) (Apprenticeship Committee made marginal notations on applications relative to union relatives). In *U. S.* v. *Local 1, Ironworkers*, 438 F. 2d 168 (C. A. 7, 1971) the instant court of appeals in discussing alleged nepotism stated that "A union which has *only white members* can effectively preclude non-whites from becoming members by giving *preference* in admission to relatives of members." (Emphasis supplied).

8. *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio, 1968); *U. S.* v. *Local 73, Plumbers*, 314 F. Supp. 160 (S.D. Ind., 1969); *U. S.* v. *Local 36, Sheet Metal Workers, et al.*, 416 F. 2d 123 (C.A. 8, 1969); *Local 53, Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (C.A. 5, 1969); *U. S.* v. *Local 38, IBEW*, 428 F. 2d 144, (C.A. 6, 1970), *cert. denied* 400 U.S. 903 (1970) and *U. S.* v. *Local 86, Ironworkers, et al.*, 315 F. Supp. 1202 (W.D. Wash., 1970) *aff'd* 443 F. 2d 544 (C.A. 9, 1971).

the sixth *(Local 53, Asbestos Workers)*, the contract did not provide for a hiring hall as such but, in fact, all contractors were required to first solicit employees through the union and could only hire off the street if no men were available, and even then had to send the men back to obtain union approval before they could be put to work. Having an exclusive hiring hall the evidence showed in three cases that no Blacks were ever referred. In the *Local 212, IBEW* case only one Black was referred. In the *Local 73, Plumbers* case the first Black ever referred or admitted to membership occurred after the complaint was filed. And, in the *Local 38, IBEW* case, only two Blacks were referred during the calendar year of 1967 while during the same period 3,485 whites were referred. All cases contained evidence of the denial of referrals to Blacks while at the same time, whites were being sent out. In the *Local 36, Sheet Metal Workers* case, the defendant unions sought only to organize white contractors with white employees. In all six cases there were either no Black members or the first Black member was admitted subsequent to the date of the enactment of the Act.[9] In *Local 212, IBEW* written examinations were

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9. In *Local 212, IBEW* and in *Local 53, Asbestos Workers* no Blacks had been admitted as of the date of the decision. As stated earlier, in *Local 73, Plumbers,* the first Black was admitted after the filing of the complaint. In *Local 36, Sheet Metal Workers* (involving several unions) the record does not reflect whether Local 36 had any Blacks, but Local 1, IBEW, also involved in the case, admitted its first Black member in 1966. In *Local 86, Ironworkers,* the first Black was admitted to membership on September 12, 1969. As regards the three other unions involved in the same case, the Sheet Metal Workers admitted their first Black member in construction in 1968 and Local 32, Plumbers (in the same case) admitted their one Black member in construction in 1966. Local 46, IBEW (involved in the same case) had two Blacks, one being admitted in 1968 and the date of admission of the other was unknown.

given for membership but only prior to 1963 and then no Blacks were permitted to take the examinations. In *Local 36, Sheet Metal Workers* no Blacks were permitted to take the written examination for membership prior to 1967. In *Local 38, IBEW*, written examinations were given only in the calendar year of 1959 and then only to whites. As regards "nepotism", in *Local 73, Plumbers*, the apprenticeship committee made marginal notations on the apprenticeship applications regarding white union relatives. In *Local 86, Ironworkers*, the sons and relatives (whites) were automatically given preference under the apprenticeship program. In *Local 53, Asbestos Workers*, as distinguished from here, members were not taken in as journeymen but could only gain entrance through the apprenticeship program called an "improver" program. For the period of four years involved in that case, *all* "improvers" were either sons of members or relatives living in the household of members (whites). As distinguished from here, there was no federally certified apprenticeship program with impartial solicitation and objective testing and ranking. And the Civil Rights Division does not contend otherwise.

We have merely highlighted the basic elements in the construction union cases but each had other specific and substantial supporting evidence of discrimination. The simple fact is that this is the only case where suit has ever been brought where there was no exclusive hiring or referral system involved. This is the only case where under the guise of claiming a discriminatory pattern or practice, the Civil Rights Division sought only to impose a *particular* plan, let alone a plan to which a union was not signatory. This Court has announced that "Congress has not commanded that the less qualified be pre-

The Metro-East situation is merely illustrative of what is happening all over. How long must this disruption continue? If a union is guilty of a pattern or practice of discrimination the laws are adequate to make corrections and to impose appropriate remedies. This country is now torn apart and needs the guidance and wisdom of this Court. The question presented is not whether the Petitioner has been or is now discriminating but whether or not one can be found guilty of engaging in a pattern or practice of racial discrimination solely because he refuses to cooperate with a pet voluntary plan to which he is not a signatory.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Chicago, Illinois
June 22, 1972

APPENDIX

INDEX

DISTRICT COURT DECISION ..... App. 1

COURT OF APPEALS DECISION ..... App. 23

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 169, an unincorporated association, and MR. HERBERT RAINBOLT; and LOCAL 480, an unincorporated association, and MR. JAMES McGUIRE, and TRI-COUNTIES ILLINOIS CARPENTERS DISTRICT COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Defendants.

CIVIL NO. 70-167

Juergens, Chief Judge

MEMORANDUM AND ORDER

This action is brought by the Attorney General of the United States of America, Civil Rights Division, pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. 2000e, et seq and 28 U.S.C.A. 1345) against the United Brotherhood of Carpenters and Joiners of America, Local 169, and Local 480 (hereinafter referred to as Local 169 and Local 480), and Herbert Rainbolt, Business Agent for Local 169; James McGuire, Business Agent for Local 480, and Tri-Counties Illinois Carpenters District Council of the United Brotherhood of Carpenters and Joiners of America (hereinafter District Council).

Generally stated, the complaint alleges that this action seeks relief for violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq) and for interference with the implementation of Presidential Executive Order 11246 and Section 22(a) of the Federal Aid Highway Act of 1968 (23 U.S.C. 140), requiring equal employment opportunities by contractors and subcontractors on Federal and Federally assisted construction projects and State certification thereof on Federal or Federal Aid Highways; that the Court has jurisdiction under the provisions of 28 U.S.C. 1345 and 42 U.S.C. 2000e-6(b); that Locals 169 and 480 are unincorporated associations of men in the carpenters trade in the East St. Louis, Illinois area; their principal offices are located in St. Clair County, Illinois; that the District Council is an unincorporated association which represents labor organizations in collective bargaining with the Southern Illinois Builders Association and has jurisdiction in St. Clair County; that Locals 169 and 480 maintain hiring hall procedures for the referral and authorization of employment applicants to perform carpenters work for contractors with whom they have collective bargaining agreements; that through the operation of the hiring hall, Local 169 and Local 480 control a substantial portion of the employment opportunities in their jurisdiction; that the District Council is a labor organization within the meaning of 42 U.S.C. 2000e(d) and is engaged in industry affecting commerce; that both Locals 169 and 480 are labor organizations within the meaning of 42 U.S.C. 2000e(d) and are engaged in industry affecting commerce; that Herbert Rainbolt and James McGuire are business agents of Local 169 and Local 480 respectively and as such are representative parties for the class consisting of members of Locals 169

and 480; that these defendants are reasonably situated to protect, fairly and adequately, the interest of the locals and their members in this litigation; that all contractors and subcontractors are required under Presidential Executive Order 11246 to provide equal employment opportunities without discrimination on grounds of race or color on all Federal and Federally assisted construction projects; that the two locals are the principal source of carpenters on highway and other Federal and Federally assisted projects; that all Federal aid construction contractors doing work which requires the use of carpenters are parties to collective bargaining agreements with Locals 169 and 480; that the collective bargaining agreements fix in the employer the sole and exclusive responsibility for hiring from any source and without regard to membership in the union or referrals or clearance therefrom; nevertheless, construction contractors obtain all or virtually all carpenters and apprentice carpenters by referral or authorization from Local 169 and Local 480; that the United States has granted financial assistance to the State of Illinois for the construction of Federal-Aid highways and the State of Illinois has let contracts for construction of such highways within the area over which Local 169 and Local 480 assert jurisdiction; that in seeking to fulfill its obligation under 23 U.S.C. 140, the State of Illinois has formulated an agreement to facilitate equal employment opportunity in state highway construction in Madison and St. Clair counties (hereinafter referred to as the Ogilvie Plan); that the Ogilvie Plan has been signed by the Southern Illinois Builders Association (hereinafter S.I.B.A.), as representative of the construction contractors, and by the Metro East Council, as representative of the black community in Madison and St. Clair

counties area; that this plan provides for the training of persons in the class which was previously subject to discrimination in the trades involved in highway construction and their placement in highway construction work; that by express agreement, informal acquiescence or consent decrees, each of the other building trades unions involved has agreed to cooperate in the implementation of the Ogilvie Plan; that defendants Local 169 and Local 480 and the District Council have pursued and continue to pursue a policy and practice of discriminating against Negroes on account of their race with respect to employment opportunities in the carpenter trade and have implemented this policy and practice among other ways as follows:

(a) By excluding Negroes from membership and from referral, or by declining to offer them referral and membership on the same basis as white persons;

(b) By causing or attempting to cause contractors to discriminate against Negroes in their hiring and other employment practices;

(c) By failing and refusing to cooperate in the implementation of the Ogilvie Plan and other plans designed to eliminate the effects of their racially discriminatory employment practices and policies;

(d) By striking or refusing to work when Negroes, trained pursuant to the Ogilvie Plan, have been hired by contractors;

(e) By failing and refusing to take other reasonable measures to eliminate the effects of their racially discriminatory policies and practices;

that by reason of the policy and practice of discrimination against Negroes on the basis of race with respect to em-

ployment opportunities, Local 169 and Local 480 and their membership and the District Council have interfered with and prevented the implementation of the national policy against discrimination in employment opportunities; that unless enjoined by this Court, the District Council, Local 169 and Local 480 and their members will continue to interfere with and prevent compliance with the national policy and the contract rights of the United States and the United States has no adequate remedy at law; that the policies and practices of the District Council and Local 169 and Local 480 constitute a pattern and practice of resistance to the full enjoyment by Negroes of their rights to equal employment and opportunity in the carpenter trade; that this pattern and practice is of such a nature and is intended to deny the full exercise of these rights in violation of Title 7 of the Civil Rights Act of 1964.

A preliminary and permanent injunction is asked.

Title 42 § 2000e-6(a) provides in pertinent parts as follows:

> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States * * *."

Subparagraph (b) of this section grants jurisdiction in the United States district courts to entertain proceedings under complaints provided for in subparagraph (a).

Title 42 U.S.C.A. § 2000e-2(c)(d) provides as follows:

> "(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

Paragraph 12 of the complaint contains the crux of the matter concerning discriminatory practices and contains the allegations upon which the complaint must rise or fall.

Paragraph 12 alleges that the defendants, Local 169, Local 480 and the Tri-County Illinois Carpenter District Council, have pursued and continue to pursue a policy and practice of discriminating against Negroes on account of their race with respect to employment opportunities in the carpenter trade and have implemented this policy and practice, among other ways, as follows:

(a) By excluding Negroes from membership and from referral, or by declining to offer them referral and membership on the same basis as white persons;

(b) By causing or attempting to cause contractors to discriminate against Negroes in their hiring and other employment practices;

(c) By failing and refusing to cooperate in the implementation of the Ogilvie Plan and other plans designed to eliminate the effects of their racially discriminatory employment practices and policies;

(d) By striking or refusing to work when Negroes, trained pursuant to the Ogilvie Plan, have been hired by contractors;

(e) By failing and refusing to take other reasonable measures to eliminate the effects of their racially discriminatory policies and practices.

At the outset it must be specifically pointed out that none of the defendants is a signatory to the Ogilvie Plan and they are not under any obligation under the provisions of the Civil Rights Act, pursuant to which this cause of action is brought, required to cooperate, implement, utilize, or in any way deal with the Ogilvie Plan, unless it shall first be established that defendants have been guilty of racially discriminatory practices. Failure to cooperate with the Ogilvie Plan or failure to follow the Ogilvie Plan, or failure to work with trainees of the Ogilvie Plan, standing alone and in and of itself, is not sufficient to establish a cause of action under this complaint. Thus, we need not deal further here with subparagraphs (c) or (d) of paragraph 12.

We reach subparagraph (e) hereof only in the event that the evidence discloses that the defendants have been

guilty of racially discriminatory policies and practices. Thus, at this juncture our inquiry is directed primarily to subparagraphs (a) and (b) of paragraph 12 of the complaint; namely, to determine whether the defendants have excluded Negroes from membership and from referral or have declined to offer them referral and membership on the same basis as white persons and by causing or attempting to cause contractors to discriminate against Negroes in their hiring and other employment practices.

It is clear that in the event the Court finds discrimination or evidence of discriminatory practices against Negroes because of their race, then the Court has ample powers to correct the evils in such discriminatory practices by prescribing an appropriate plan to correct the evils attendant to present discrimination or to correct the result of past discriminatory practices.

As nearly as the Court can determine from the conglomerate of evidence presented, the Government sought to establish the allegations in its complaint with regard to its discrimination claims by two methods; namely, (1) by providing statistics in an effort to show the disparity between the number of white union members and the number of black union members, the number of hours worked by white members and the number of hours worked by black members, the number of whites and blacks in the apprenticeship programs of the two locals, and (2) by testimony of individuals who purportedly had direct knowledge of discriminatory practices.

In order to establish the population percentages of white and non-white, the Government on direct examination of Mr. Paul J. Wisner showed that he had made reference to the 1960 census statistics and it indicated that the non-

white population of St. Clair County was 20% and that the white percentage was 80%; that it was his understanding that the East St. Louis vicinity was 60 to 65% non-white in 1960 and has appreciated to about 70 to 75% in 1970. There was no evidence to show the percentage of white to non-white in St. Clair County as a whole in 1970. There was no evidence to establish the percentage of white to non-white in any years prior to 1960, although the Government makes great issue of the fact that Local 169 received its first black member in 1948. Neither was there any evidence presented as to how many of the members of 169 or 480 resided within the jurisdiction of the unions; to the contrary, the evidence did establish that some of the union members reside outside the jurisdiction and that a member of the union does not necessarily need to reside within the area of his work jurisdiction. It was established that Local 480 has 367 members of whom only one is black; that there was one other black member of the union who had been dropped from the rolls for non-payment of dues and who was at the time he was dropped working for the Civil Service as a carpenter. It was also established that no blacks had at any time made application to the apprenticeship program or to join Local 480 itself (the only two black members having come into Local 480 by consolidation with other locals). Local 169 has approximately 440 active members and 110 inactive members. It has 40 black members. It has 14 apprentices in its apprenticeship program, of which 5 are black and 1 is Spanish-American.

The Government attempted to establish that there has been a disparity of work opportunities afforded between blacks and whites and that the whites have received more favorable treatment in work opportunities than have blacks.

The Government attempted to show this by welfare reports, pension plans and other union records. During the course of the trial it was shown that in many instances the union members who are working do not necessarily appear on any of these rolls; for example, a self-employed carpenter nowhere appears on these particular reports and members working outside the jurisdiction do not appear, members working for an entity which has its own separate welfare and pension plan do not appear. While the Government attempts to show disparity in favor of whites in the area of hours worked, the defendants by utilizing the same facts and figures show a disparity in favor of blacks. Thus, it is quite apparent that the statistical evidence upon which this particular point rests can be afforded little, if any, credibility; because it is so incomplete, it has very little evidentiary value.

The Government also argues that nepotism is rampant in the union membership as well as in the union training programs. Viewing the evidence concerning nepotism, it may well be that it does exist in the carpenter trade as it does in other areas and specifically the professions. The evidence discloses, however, that the nepotism is not racially oriented. Many of the blacks have relatives in the union and/or in the training programs, as do also whites. The evidence when viewed in its true perspective in this regard appears to be that perhaps the opportunities to know of work availability and union openings is the cause for relatives being taken into the union, both in the union proper and in its training programs, rather than any racially discriminatory practices which the Government seeks to urge here.

The Government raises issue with the unions for not maintaining hiring rosters and charges that by virtue of

not following such procedure, there has been discrimination in the hiring hall against blacks. The evidence established that the procedure in the hiring hall was for the business agent to call out, among other things, the type of job available, the number of carpenters needed on the particular job, and that those carpenters desiring to take the offered employment "jumped up" and whoever was the first to "jump up", as they put it, was given priority on the job. Both blacks and whites testified that this procedure was followed in the union hall hiring practice and each testified that it did not result in discrimination against blacks; that the blacks had an equal opportunity with the whites; that if blacks "jumped up" first, they would be awarded the job on equal basis with the whites. There was not one scintilla of evidence presented to show that this particular procedure resulted in any racial discrimination.

Testimony of Government Witnesses

Walter Simms, a 22-year-old black, was called as a witness for the plaintiff and testified he had experience in the carpenter trade, which he had obtained from working with his father; that he had worked for his father about 7 years, doing such work as hanging doors, framework, building steps, setting forms for concrete; that he had 8 brothers who also worked as carpenters; that in November of 1969 he had gone to the H. H. Hall Construction Co. and asked for employment; that he was hired by the H. H. Hall Co. and went on the job and that day all the carpenters got sick and went home; that he went to the union hall to join the union and was advised that he could not join. He stated he was given some kind of reason, but that he forgot it; that he returned to work on the job

after going to the union hall and worked until he was laid off; that he had gone to the union hall about 3 times to obtain a permit or join the union, but that since that time he has not made any attempt to obtain a permit or membership in Local 169. On cross-examination he testified that he wanted to join the union, but that he did not want to pay the money to join because he did not want to invest money in a union that is not going to refer you to a job; that he worked on the job for 7 working days; that while he was working, he worked with the carpenters; that during the course of this job he worked with white carpenters, but that there were both black and white carpenters on the job; that when the carpenters walked off the job his first day, the black carpenters, as well as the white, left the job; that he never returned to obtain any job from Hall at any other time; that this was the only time he was looking for a job in construction; that 3 of his brothers are members of the carpenters union in Missouri and on occasion they work in the jurisdiction of Local 169. He was asked if he worked regularly for his father; he replied: "No," that he "worked whenever he took a notion." During the years 1968, 1969 and 1970 he did not work and earn enough to be required to file an income tax return.

Oscar Dean testified that he was a Negro; that he had been in the carpenters union since 1946, had started working as a carpenter in 1923; that he joined the carpenters union in Sacramento, California and transferred to Reno, Nevada and later transferred to Omaha, Nebraska and finally to Des Moines, Iowa; that in 1959 he went to the union hall for Local 169 in East St. Louis and asked about getting into the union; he told the business agent that he wanted to become a member of the union and asked if

his fees could be paid in downpayments or if he had to pay it all at once; he was told that he could get a permit to work for 30 days and after 30 days he would have to pay the $200 for initiation, which he agreed to do, but about 2 weeks after he got the permit, the carpenters went out on strike, which lasted over a month; that after the strike was over, he returned to the union hall and asked to go back on the job; he was informed that there were card men who had no jobs. He testified he showed the business agent his permit and was told he could be given no consideration because card men were not working. He stated that he had not been able to work his entire time on the permit and he went to the Human Relations and then he wrote to Congress to see if he could get some consideration for his permit for which he had paid. On cross-examination he testified he had never made any attempt to transfer into the East St. Louis Union because he had let his card expire for non-payment of dues; that he did not notify the business agent that he had been a member of the carpenters union previously, nor did he inform the business agent of his prior work experience as a carpenter.

According to the testimony of Oscar Dean, it appears that his primary complaint was not that he had been discriminated against because he was black, but rather that he had not been permitted to work the 30 days to which he believed he was entitled to work on a permit. He did testify that on one occasion he had called the union hall and asked if they needed carpenters; that he spoke to some lady whom he did not know and when he asked if they needed carpenters, she said, "Yes"; when he asked if that applied to colored, she asked if he was colored; he replied that he was; she then told him: "You call Joe Preston. He takes care of the colored carpenters." The only two females

working in the union hall testified that they had no knowledge whatever of the telephone conversation, that they had no knowledge of any such circumstances, and in no event did they have any authority to inform anyone concerning job opportunities or assignments to jobs.

Leonard Whiteside testified that he is a Negro and a carpenter; that he began carpenter work in 1950; that on February 14, 1968 he went to the union hall of Local 169, seeking to join the union; he was instructed by the business agent that they were not taking members at that time. He did, however, obtain a permit and on one occasion since then called and inquired of the business agent concerning membership and was told again that the union was not taking members at that time. He never made any other attempts to join the union and testified that at the time he went to the union hall, seeking membership therein, there were a number of men sitting around the hall waiting for work; that after receiving his permit he continued to work on jobs that he had procured for himself, as he had previously done before acquiring the permit.

Lonzo Hibbler testified that he was a Negro and a carpenter and had been working as a carpenter for about 30 to 35 years; that in 1958 to 1959 he attempted to get a union membership from Local 169; that when he went to the union hall there was one gentleman in the office; he did not know who the man was; he did not ask him his name; he asked how much it would cost to join and was told $150, that actually they didn't take in any colored, he would have to go to Cairo, Illinois; that he did not make any further attempts to join. The witness couldn't further identify the person in the office with whom he spoke concerning the membership. He testified that he knew a number of other colored carpenters who were in

the union; that he had talked to one Andrew Jenkins who stated he had paid his cash money and he was in the union.

William Floyd Ezell testified he was a black and a carpenter and had worked as a carpenter since 1968; that in 1968 he joined Local 169; that he first made application in the summer of 1968 and was informed that they were not taking new members; approximately 3 months later he returned and was informed they were still not accepting applications, but was told if he would go get a job and come back, he could then join; that subsequently he returned to the union hall, paid the $200 initiation fee and was granted an application and became a member of the union. He testified that he had been to the union hall on a number of occasions when jobs were called out and to his knowledge at no time were whites preferred over blacks. He further testified that he had an equal opportunity to claim jobs when they were called out in the union hall with anyone else.

R. B. Atchison testified he is a Negro and a carpenter, has worked as a carpenter for about 20 years; that he had never made application to Local 169; that he had gone to the union hall in 1961 and was told they were not taking anybody, so he never did go back; that he had training under the Ogilvie program and was considered an advanced trainee under that program.

Ralph Foster testified he is a Negro; that he worked as a carpenter for about 30 years; that in April of 1968 he went to the union hall for Local 169 to get a permit and was told by the business agent that they were not issuing permits; that after he left the union office, he went to Rex Carr's office (an East St. Louis attorney) and was given a check for $65 and told to take it back to the union

hall to Mr. Rainbolt; that when he returned to the union hall Mr. Rainbolt was not there; that he stayed around for a couple of hours, went out and got a cup of coffee, and then returned and there were 3 or 4 old fellows sitting around in the hall, and he asked where Mr. Rainbolt was and they said they too were looking for him; that he hung around for a while but nothing happened so he left; that about 30 days later he went to work at the National Stockyards.

T. H. McClendon testified he was of the Negro race, a carpenter and a member of Local 169 and had been a member since 1954; that during the course of time he was a member, he had been to Local 169 union hall on many occasions for the purpose of being referred to work; that he had never seen any discrimination on the basis of race in hiring practices; that on occasions he had, in fact, although a black, received jobs before whites, even though there were whites in the union hall at the same time; that over the years that he was there, he has always had an equal opportunity with whites as a member of the union in obtaining employment through the union.

Testimony of Defendants' Witness

Edward Slack testified that he is black; that he had been subpoenaed by the Government; that he is the President of Upgrade Construction Company and is the majority stockholder and has been with the company for approximately 2 years; that he is the director of a work training program known as Project Upgrade; that he is presently working on a HUD Turn-Key project, which has a value of about $3,800,000; that he is acquainted with Herbert Rainbolt, the business agent of Local 169; that he is a member of 169; that he has never had any trouble getting black men

out of the union hall and has assisted blacks in becoming members of 169; that he has taken a number of blacks down to the union hall and that they have never been refused membership; that he became a member of Local 169 in 1970 and that he had not attempted to obtain membership prior to that time because it was not until 1970 that he started into the building industry; that in December, 1969, he took about 50 or 60 blacks down to join the union; that approximately 15 of this number were qualified carpenters; that membership had been denied to the group when they were taken down; that he did not tell the business agent which of the men were qualified, he merely told the business agent, "You should take these 50 or 60 blacks."

Considering the testimony of the Government's witnesses in furtherance of their claim to establish discrimination against blacks, the testimony of only two even remotely tended to indicate a possible discrimination on the basis of race. Oscar Dean in his testimony appeared to be primarily concerned with the fact that he had not been permitted to work the full 30 days to which he felt himself entitled under his work permit. He did make some reference to a telephonic conversation in which some person, supposedly speaking from the union hall, had asked if he was colored and he was then told, "Well, you see Joe Preston. He takes care of the colored carpenters." He could not identify the person with whom he was talking. There is no evidence whatever bearing further on what was meant by the statement. Standing alone, without some further explanation, the statement does not establish that there was discrimination on the basis of color.

The only other testimony tending to show discrimination was that of Lonzo Hibbler, who testified that someone in the union hall "told me that actually they didn't take in

any colored; he would have to go to Cairo, Illinois." He could not identify the person with whom he had spoken, and although the business agent was present in court, the witness could not identify him as the person having made the statement, notwithstanding he was specifically asked if the business agent sitting in court was the man who made the comment.

According to plaintiff's Exhibit 6, blacks were taken into Local 169 beginning in 1948 through 1970.

Black members were accepted into the union in the following years in the following numbers:

1948 — 2 members
1950 — 2 members
1953 — 1 member
1955 — 1 member
1960 — 4 members
1964 — 1 member
1965 — 2 members
1966 — 7 members
1967 — 1 member
1968 — 4 members
1969 — 6 members
1970 — 8 members

It is interesting to note that counsel for the Government stated: "Just for the record, the government has talked to a lot of people and looked at a lot of documents."

Considering all of the evidence, both documentary and oral testimony, it appears to this court that if there was in fact a pattern or practice and the Government did in fact interview a lot of people and look at a lot of documents, certainly if there did exist a pattern or practice of discrimination, somewhere in the evidence there would have been some factual basis upon which this allegation was based.

When the record is considered based on the oral testimony, only two witnesses vaguely testified concerning isolated possible discriminatory statements over a period apparently from 1948 to the time of trial. If there existed a pattern or practice and the Government "has talked to a lot of people and looked at a lot of documents," then a great deal more evidence should have been available and presented.

The documentary evidence by which the Government seeks to establish the pattern or practice of discrimination against blacks based on the statistical theory falls far short of establishing such a charge. While one might assume that the limited number of blacks in Local 169 and Local 480 could have resulted from discriminatory practices, one can also assume that the lack of blacks in Locals 169 and 480 might as properly be attributed to other factors — as to 480, there is according to the testimony less than 1/10th of 1% black in the region covered by the union and there were no applications made to join 480 by a black.

With regard to Local 169, the lack of blacks in the union might readily be attributed to a lack of diligent efforts on the part of the blacks to effectively pursue their attempts to become union members. According to the testimony, several of the witnesses went to the union hall on one occasion and, being unable to join at that time, never went back. One of the witnesses upon returning to the union for the third time and paying the initiation fee was admitted into membership. One other witness had been a member of several different carpenter locals during his life, but upon making application to Local 169 did not make it known that he was a union member of another local, which would, according to the testimony, have entitled him to transfer into Local 169. Another witness testified he did not want

to be out the money unless he was going to be referred out to work.

Any of the reasons above for failure of the persons testifying to become members of the locals may properly be the reason why they were not admitted into the union, as well as the fact that they were black.

There is no dispute that the carpenters refused to work with the Ogilvie Plan trainees, but it cannot be successfully contended that the failure of the carpenters to work with the Ogilvie Plan trainees was the result of discrimination on the basis of color, since the number 1 apprentice belonging to the union, waiting to be referred to a job, was also black. If there was discrimination with regard to the Ogilvie plan, the evidence showed it was based on union versus non-union, but definitely not on race.

By this suit the Civil Rights Division of the Justice Department has created a lot of waves without the resulting cleansing of the beaches. It has attempted to force upon these two unions the "Ogilvie Plan," which has no force of law and which is not binding on anyone save those parties signatory thereto.

It has attempted by calling a great number of witnesses to prove discrimination and a violation of the Civil Rights Act of 1964. Some of these witnesses described the preliminaries to the adoption of the "Ogilvie Plan" and to the resulting effect they expected such plan to have.

It also called the majority of the carpenter trainees under the "Ogilvie Plan" and by such questions as—"Are you willing to join the union?" and "Do you want to join the union?"—attempted to show discrimination and then boldly announced—"We have proven our case. Now the burden of proof shifts to the defendants to prove they did

not violate the Act." The weight of the evidence is not determined alone by the number of witnesses testifying upon the one side or another of a given case. The weight of testimony is determined by quality as well as quantity and quantity alone cannot do the trick.

The raw meat of this case began to sear with the testimony of witnesses Dean and Hibbler, both black, but, unfortunately, because of lapse of time and inability to remember or identify the person or the connection that such person had with the defendant or the position with the defendant, they were unable to say who made the statements that they expected would show discrimination. The fire then went out before the meat was cooked. These two witnesses' main thrust occurred in 1958 or 1959 and was vague. As against these two witnesses a number of Government witnesses, all black and members of the union, stated that they were satisfied and that they had not been discriminated against, that they went to the union hall the same as white carpenters and bid on jobs the same as white carpenters and one said that he on occasion had gone out ahead of white carpenters. This is a pattern and practice case under Title VII of the Civil Rights Act of 1964. No pattern or practice prior or subsequent to the Act has been established by preponderance or greater weight of the evidence and no discrimination has been shown which would justify this court in finding the defendants guilty.

This is a land of law and not of men, and the law must be respected regardless of whom it helps or whom it hurts. We cannot operate on sympathy, prejudice, biasness, feeling, nor can we guess, speculate or conjecture.

An attempt was made to bolster the case by statistics—but to be of value statistics must relate to the case as a

whole and not be piecemeal. If statistics show the whole picture, they are of much value, but if statistics fail to take into consideration a number of basic facts which must be considered in deciding the case as a whole, then such statistics must be weighed in the light of such deficiencies.

The Civil Rights Act of 1964 is the law of the land. It must be followed. It must be obeyed in spirit as well as in fact and it must not be violated or flaunted by subterfuge.

For the above and foregoing reasons, the Court finds that the United States has failed to establish the necessary elements of proof required to establish its claim and accordingly judgment will be entered in favor of the defendants and the Government's prayer for injunction will be denied for failure to establish a pattern or practice of discrimination.

The above and foregoing shall be considered findings of fact and conclusions of law.

IT IS, THEREFORE, THE ORDER of this Court that judgment be and the same is hereby entered in favor of the defendants, United Brotherhood of Carpenters and Joiners of America, Local 169, an unincorporated association, Mr. Herbert Rainbolt, Local 480, an unincorporated association, Mr. James McGuire, Tri-Counties Illinois Carpenters District Council of the United Brotherhood of Carpenters and Joiners of America, and against the plaintiff, United States of America.

WILLIAM G. JUERGENS
Chief Judge

DATED: April 7, 1971

In The

United States Court of Appeals

For The Seventh Circuit

SEPTEMBER TERM, 1971 SEPTEMBER SESSION, 1971

No. 71-1389
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 169, an unincorporated association, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Illinois.
Civil No. 70-167
WILLIAM G. JUERGENS, *Judge.*

JANUARY 4, 1972

Before FAIRCHILD and SPRECHER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

SPRECHER, *Circuit Judge.* The principal question raised by this appeal is whether a construction union may be engaged in a pattern or practice of resistance to the full enjoyment of the employment rights guaranteed by Title VII of the Civil Rights Act of 1964, because it refuses to cooperate with a plan — intended to implement those rights — to which it is not a party.

*Senior Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

This action was brought by the Attorney General, who sought relief for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and for interference with the implementation of Presidential Executive Order No. 11246 and Section 22(a) of the Federal Aid Highway Act of 1968, 23 U.S.C. § 140, which require equal employment opportunities by contractors and subcontractors on federal and federally assisted construction projects.

In July 1968, the United States Department of Transportation ordered all federal funds for highway construction in Madison and St. Clair Counties withheld from the State of Illinois for an indefinite period because of high costs and lack of equal employment opportunities.

Six principal crafts perform approximately 95 percent of the work on highway construction — teamsters, laborers, carpenters, cement finishers or masons, ironworkers and operating engineers.

After the freeze of federal highway funds in the two counties, representatives of the six craft organizations, of the contractors and subcontractors and of the black community met with federal and state officials. Their meetings resulted in the promulgation on June 3, 1970 by the governor of Illinois of "An Agreement to Facilitate Equal Employment Opportunity in State Highway Construction in Madison and St. Clair Counties" (Ogilvie Plan).

The Ogilvie Plan was signed and executed by the Southern Illinois Builders Association, an Illinois not-for-profit corporation whose members are contractors engaged in the building and construction industry in southern Illinois, and by the Metro-East Labor Council, Inc., an organization of representatives of the black community in Madison and St. Clair Counties whose purpose is the furtherance of equal employment opportunities in the construction industry.

The two teamsters locals affected signed an "Addendum" to the plan and agreed to its implementation. The laborers have acquiesced in its implementation. After the filing of suits similar to this one by the United States, the cement finishers, ironworkers and operating engineers, through their respective unions, entered into consent decrees and agreed to cooperate with the plan.

After the promulgation of the Ogilvie Plan, federally assisted highway construction resumed in the two-county area.

A few days after the promulgation of the plan, the business agent for one of the Carpenters Union locals wrote ". . . [W]e will co-operate with all concerned and work religiously with the addendum to the contract. . . ." Since the program was initiated, however, the carpenters have repeatedly, frankly and openly admitted their opposition to the program.[1]

The action was filed on November 25, 1970 against two Carpenters Union locals (169 and 480), their business agents (Rainbolt and McGuire) and the Tri-Counties Illinois Carpenters District Council of the United Brotherhood of Carpenters and Joiners of America (Tri-Counties Council). It alleged violation of Title VII of the Civil Rights

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[1] The defendants in their brief in this court have stated (page 12, footnote 10): "The Civil Rights Division introduced a series of witnesses to prove that the Defendants were opposed to and would not cooperate with the Ogilvie Plan and that they refused a request to 'refer' Ogilvie Plan trainees to the Hall Construction job. . . . Actually, such testimony was unnecessary because the Carpenters, in their Answer, openly admitted their opposition to the Ogilvie Plan, pointing out their objections thereto and stating, *inter alia*, that the instant lawsuit was merely a device to have them accept the Ogilvie Plan to which the Carpenters were not signatories. . . . Rainbolt, in his deposition, . . . testified that not only did his organization and members oppose the Ogilvie Plan, but, additionally, the Plan was opposed by the Tri-Counties District Council of Carpenters and the Illinois State Council of Carpenters. Rainbolt repeated such statements in his testimony in open court . . . as did Richard Meile for the District Council . . . and James McGuire for Local 480. . . . Similarly, employees of Hall, who quit his employment, expressed their opposition to the Ogilvie Plan. . . ."

Act of 1964[2] and interference by the defendants with the implementation of Executive Order 11246[3] and Section 22(a) of the Federal Aid Highway Act of 1968.[4]

The carpenters as a group did not question the legality of the Ogilvie Plan[5] but "adamantly resisted the attempted imposition of the plan upon it because of its belief that it would ruin the status of the craft and destroy the apprenticeship program and seriously undermine the collective bargaining agreement."

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[2] Section 707 of the act provides in part (42 U.S.C. § 2000e-6): "(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint . . . requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

[3] Under Executive Order 11246 (42 U.S.C. § 2000e, p. 610): "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, . . . recruitment . . . and selection for training, including apprenticeship."

[4] Section 22(a) of the Act provides in part (23 U.S.C. § 140): "In approving programs for projects on any of the Federal-aid systems, the Secretary shall, where he considers it necessary to assure equal employment opportunity, require certification by any State desiring to avail itself of the benefits of this chapter that there are in existence and available on a regional, statewide, or local basis, apprenticeship, skill improvement or other upgrading programs, registered with the Department of Labor or the appropriate State agency, if any, which provide equal opportunity for training and employment without regard to race, color, creed or national origin."

[5] The plan was held to be in accord with the Civil Rights Act of 1964 and not violative of the Fifth or Fourteenth Amendments in *Southern Illinois Builders Association* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), pending on appeal in this court as No. 71-1771.

I

As in most cases involving Title VII of the Civil Rights Act of 1964, this case begins with statistical evidence or demography. Racial statistics not only serve to trigger enforcement,[6] but "[o]n the basis that a showing of an absence or a small black union membership in a demographic area containing a substantial number of black workers raises an inference that the racial imbalance is the result of discrimination, the burden of going forward and the burden of persuasion is shifted to the accused, for such a showing is enough to establish a *prima facie* case." *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 551 (9th Cir.), *cert. denied*, 40 U.S.L.W. 3263 (1971).

Locals 169 and 480 are unincorporated associations of men in the carpenters' trade in the East St. Louis area. Their principal offices are located in St. Clair County, Illinois; East St. Louis is the principal metropolitan area in St. Clair County.

The district court complained of the incompleteness of the racial statistics furnished; but the statistics are readily available and show the following black population:[7]

	East St. Louis	St. Clair County
1940	22.2%	12.9%
1950	33.5%	16.8%
1960	44.6%	18.3%
1970	69.2%	22.4%

[6] Fiss, "A Theory of Fair Employment Laws," 38 U. of Chi. L. Rev. 235, 268-81 (1971). The classic statement has been that "statistics often tell much, and Courts listen." *Alabama* v. *United States*, 304 F. 2d 583, 586 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962).

[7] These statistics are from the United States Bureau of Census Reports, of which a court may take judicial notice. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426 n. 4 (8th Cir. 1970). Moreover, the testimony adduced regarding population for 1960 and estimated for 1970 was substantially comparable to the exact census figures.

Both Locals 169 and 480 have reputations in the black community as white locals. Prior to 1948, there were no black members of Local 169. The evidence showed and the district court found that Local 169 has approximately 440 active members and 110 retired members. Of these 550 members, 39 or about 7 percent are black and were admitted in the following years:

1948 — 2	1965 — 2
1950 — 2	1966 — 7
1953 — 1	1967 — 1
1955 — 1	1968 — 4
1960 — 4	1969 — 6
1964 — 1	1970 — 8

Ten of the 39 were transfers from other carpenter unions. Local 480 has 367 members, one of whom is black.

The black members of Local 169 worked an average of 1300 hours during the year August 1, 1969 to July 31, 1970, in contrast to the 1524 average hours worked by white members. The white members worked 17.2 percent more hours on the average than the black members.

There was other, non-statistical evidence of discrimination.

The district court, finding some evidence of nepotism, said, "[I]t may well be that it does exist in the carpenter trade as it does in other areas and specifically the professions." The Fifth Circuit observed in *Local 53, Asbestos Workers* v. *Vogler,* 407 F. 2d 1047, 1054 (5th Cir. 1969):

> "While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to Negroes

and Mexican-Americans any real opportunity for membership."[8]

Although Locals 169 and 480 did not under their collective bargaining agreement operate exclusive hiring halls or exclusive referral systems, they did refer persons out for carpentry work through hiring halls. The district court found:

> "The evidence established that the procedure in the hiring hall was for the business agent to call out, among other things, the type of job available, the number of carpenters needed on the particular job, and that those carpenters desiring to take the offered employment 'jumped up' and whoever was the first to 'jump up,' as they put it, was given priority on the job. Both blacks and whites testified that this procedure was followed in the union hall hiring practice and each testified that it did not result in discrimination against blacks; that the blacks had an equal opportunity with the whites; that if blacks 'jumped up' first, they would be awarded the job on equal basis with the whites."

Such a system of referral is wholly subjective and inherently non-reviewable; nevertheless, it must be viewed in light of the facts that white members worked 17 percent more hours on the average than black members and that the Union official who determined who "jumped up" first told a contractor seeking a black carpenter on at least one occasion, "I have 125 white men sitting here who have been paying dues in this union for years and I cannot send out the black ones before them."

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[8] Judge Kiley made a similar observation in *United States* v. *Iron Workers, Local 1*, 438 F. 2d 679, 683 (7th Cir. 1971). Sons of some of Local 169's early black transfer members were admitted in later years, which shows, as the district court found, that "the nepotism is not racially oriented." However, when the union opens its doors to a token number of blacks, nepotism applied evenly tends to solidify the minuscule percentage of blacks.

The Union also controlled hiring by issuing or refusing to issue "permits" to nonmembers who had obtained carpentry jobs. Many contractors would not let a man work if he had failed to obtain a permit from the Union. There was considerable evidence that the Union's policy in issuing permits discriminated against black persons.

The district court concluded that the small number of black members in the Carpenters Union "might readily be attributed to a lack of diligent efforts on the part of the blacks to effectively pursue their attempts to become union members."[9] He found that the nepotism was "not racially oriented" and that, in regard to the hiring halls, "[t]here was not one scintilla of evidence presented to show that this particular procedure resulted in any racial discrimination."

These conclusions cannot follow from the undisputed evidence in this record in view of the Supreme Court's language in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430, 431, 432 (1971):

> "Under the [Civil Rights] Act [of 1964], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. . . .
>
> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . .

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[9] Walter Simms, a black carpenter with seven years' experience, tried unsuccessfully three times to get a work permit from Local 169. Oscar Dean, a black carpenter since 1923 and a member of several locals throughout the country of the United Brotherhood of Carpenters and Joiners of America since 1946, tried to transfer to Local 169 in 1959 and again in 1969 and he went to the union hall 20 to 30 times in 1970 looking for work. Leonard Whiteside, a black carpenter, made two unsuccessful attempts to join Local 169. Lonzo Hibbler, a black carpenter, tried once. Ralph Foster, a black carpenter, tried twice. Edward Slack, a black contractor, tried to get 50 to 60 blacks, at least 15 of whom were qualified carpenter journeymen, into Local 169 prior to 1969 without success.

"... Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." (Emphasis in original.)

Courts have the power and the duty not only to prevent future discrimination and to terminate present discriminatory practices, but also to eliminate the vestiges of past discrimination. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); *United States* v. *Ironworkers Local* 86, 443 F. 2d 544, 553 (9th Cir.), *cert. denied*, 40 U.S.L.W. 3263 (1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 427 (8th Cir. 1970); *United States* v. *Sheet Metal Workers, Local* 36, 416 F. 2d 123, 131 (8th Cir. 1969); *Local* 53, *Asbestos Workers* v. *Vogler*, 407 F. 2d 1047, 1052-53 (5th Cir. 1969).

II

The Ogilvie Plan provided a program for the recruitment, placement and training of minority group members in the highway construction industry. Minority Group members who had worked as journeymen "under permit" for at least one year were to be considered as qualified journeymen by the contractors, who were to make every effort to employ them. Minority applicants who believed that their previous experience qualified them as journeymen were to be considered by a craft selection subcommittee of a six-member Equal Opportunity Administrative Committee, consisting of two members representing the contractors, two representing the black community and two representing the governor. If the craft selection subcommittee determined that the minority applicant's experience qualified him as a journeyman, he was to be so considered for employment by the contractors.

Those minority applicants who did not qualify as journeymen were eligible for a one-week orientation course in highway construction work, followed by a training program in one of the six trades. In the case of carpenter trainees, the training program was to consist of 480 hours of instruction during a 12-week period in the highway construction off-season. After successful completion of the training course and testing, the trainees who were deemed qualified by the committee were to be given immediate journeyman status. Those who passed the training course and tests but were not deemed equivalent in skill for journeyman status were to be hired by the contractors as trainees for up to 200 days of on-the-job training at wages of from 60 to 90 percent of the journeyman's rate for the carpenter craft.

On November 13, 1970, the first 15 black trainees graduated from the Ogilvie Plan's 12-week training course in carpentry and were ready and willing to be referred to contractors and to receive their on-the-job training. H. H. Hall Construction Company (H. H. Hall), a member of the Southern Illinois Builders Association (SIBA), because of its contractual obligations with the State of Illinois and the federal government, requested a trainee from Local 169 on November 16. The business agent told Hall that the Union would not honor its request and would not cooperate with the Ogilvie Plan. In addition, the Union assessed a fine of $200 against the Local 169 member who trained the Ogilvie Plan trainees.

On November 17, the Metro-East Labor Council, Inc., referred seven trainees to the union hall and requested that the Union issue them permits. None of the trainees was issued a permit. H. H. Hall again called the Union on November 17 and requested the Union to refer either Earl Johnson or Julius Neither, both black trainees. The Union refused to honor this request.

In refusing to do so, the business agent of Local 169 referred several times in the telephone conversation to the Ogilvie Plan in terms laden with racial overtones.

H. H. Hall then exercised its prerogative under the collective bargaining agreement[10] and hired Julius Neither directly on November 18.

All the carpenters except the two stewards[11] promptly walked off the job. Thereafter, the two stewards refused to assist or give any training or instructions to any black Ogilvie Plan trainee, although they do assist and instruct other persons who are performing carpenter work. In addition, on the following day after a Union steward talked to them, two white carpenters walked off the H. H. Hall yard job, located approximately four miles from the job site where the trainee was working.

None of the carpenters who "walked off" returned to work for H. H. Hall, although the company made repeated requests to them and to the Union for them to return to work.

One carpenter who indicated that he was willing to work for H. H. Hall during the strike was afraid that taking the job would require him to "sacrifice my card," that is, lose his Union membership. The Union failed to refer any carpenters to H. H. Hall, although it had a number of men out of work. One carpenter who sought work from the Union was told that there was no work, although H. H. Hall had renewed its request for carpen-

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[10] "Responsibility for Hiring. The EMPLOYER shall have the sole and exclusive responsibility for hiring and may hire from any source it desires without paying heed to membership in the UNION or referral or clearance therefrom."

[11] The Union admitted that the only reason the stewards were left on the job was that the contract contained a no-strike clause; leaving the stewards on the job allegedly gave the Union some basis for arguing that the walk-off was not a strike.

ters the afternoon prior to and earlier the same morning of the carpenter's inquiry. Four of the carpenters who walked off the Hall job site were referred to other jobs immediately thereafter, although the Union had many other men out of work.

The H. H. Hall work stoppage forced it to lay off other personnel as well, thereby making that contractor and other members of the SIBA reluctant to implement the Ogilvie Plan by hiring black trainees. At the time of the trial, there was apprehension that the two-county freeze of federal highway funds to the State of Illinois would be resumed as a result of the obstructionist techniques of the defendants.

The district court found that "none of the defendants is a signatory to the Ogilvie Plan" and that "[f]ailure to cooperate with the Ogilvie Plan or failure to follow the Ogilvie Plan, or failure to work with trainees of the Ogilvie Plan, standing alone and in and of itself, is not sufficient to establish a cause of action under this complaint."

The error made by the district court is that failure to follow the Ogilvie Plan is upon this record clearly not "standing alone and in and of itself." The record begins with the historical exclusion of blacks, reinforced by nepotism and hiring hall "jump-up" referrals. The record continues through the militant opposition not only to the Ogilvie Plan itself but also to the equal employment opportunities which the plan was striving to achieve.

The Federal Aid Highway Act of 1968 requires the State of Illinois to adopt the Ogilvie Plan or one substantially like it with apprenticeship, skill improvement or other upgrading programs; Executive Order 11246 requires contractors to take affirmative action in regard to equal opportunity employment, upgrading, recruitment and selec-

tion for training, including apprenticeship; and Title VII of the Civil Rights Act of 1964 provides (42 U.S.C. §2000e-2(c)):

> "It shall be an unlawful employment practice for a labor organization—
>
> "(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> "(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

It is also an unlawful employment practice for any labor organization (42 U.S.C. §2000e-2(d)) "to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

In this case, the state attempted to perform its duties under the statute, the contractors tried to fulfill their responsibilities under the executive order, and five of the six crafts affected strove to achieve some of the goals fixed by the Civil Rights Act of 1964. The defendants believed that they could single-handedly and actively undermine the joint efforts of the federal and state governments,

the black community, the contractors and the other labor organizations by not becoming a signatory to the plan.

In view of the record in this case, it is wholly immaterial whether the defendants were signatories or not. Congress did not intend that the Civil Rights Act be applicable to and enforceable against only those persons who contractually agree to be bound to a plan of implementation. Moreover, the failure of the defendants to agree to the Ogilvie Plan obviously did not entitle them to interfere with the contractual rights of those who did so agree. The defendants have interfered with the contract between the SIBA and Metro-East Labor Council, Inc., and they have particularly interfered with and sought to procure its breach by H. H. Hall Construction Company. Prosser, *Law of Torts*, 950-95 (3rd ed. 1964).

The record contains undisputed facts which amply support the charge in the complaint of "interference with the implementation of Presidential Executive Order 11246 and Section 22(a) of the Federal Aid Highway Act of 1968."

The district court was clearly in error in finding for the defendants and against the United States. It clearly erred in finding, "If there was discrimination with regard to the Ogilvie Plan, the evidence showed that it was based on union versus non-union, but definitely not on race." *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

III

The defendants rely, in their effort to support the district court's judgment, not only upon their failure to sign the Ogilvie Plan but also (1) upon the fact that under their collective bargaining agreement the Carpenters Union does not operate exclusive hiring halls and (2) upon the establishment by the Carpenters Union of its own appren-

ticeship system. The evidence in the record relating to these facts tends to support the conclusion that the defendants were and are "engaged in a pattern or practice of resistance to the full enjoyment of the rights secured" by Title VII of the Civil Rights Act of 1964, rather than the contrary.

Although the collective bargaining agreement between the SIBA members and the Carpenters Union does provide that the employer "may hire from any source it desires without paying heed to membership in the union or referral or clearance therefrom," the futility of an employer's attempting to hire outside the Union hiring halls is completely documented by the H. H. Hall episode.

The executive director of the SIBA testified that the vast majority of contractors call the union hall for referral; that the contractors rarely hire men off the street; and that if they do "it normally leads to a reluctance on the part of the union people to work with the men hired off the street," particularly if a nonmember is taken on.

The defendants argue that in the "only six cases in which decisions have been written in completed cases dealing with 'pattern or practice' suits *brought against construction unions* under the Civil Rights Act of 1964 . . . there was an exclusive hiring hall. . . ."[12]

In all six cases, the courts found that the particular construction unions involved pursued a pattern or practice of resistance to full employment of blacks in violation of

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[12] *Dobbins* v. *Electrical Workers, Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968); *United States* v. *Plumbers Local 73*, 314 F. Supp. 160 (S.D. Ind. 1969); *Local 53, Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (5th Cir. 1969); *United States* v. *Sheet Metal Workers, Local 36*, 416 F. 2d 123 (8th Cir. 1969); *United States* v. *Electrical Workers, Local 38*, 428 F. 2d 144 (6th Cir), *cert. denied*, 400 U.S. 943 (1970); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir.), *cert. denied*, 40 U.S.L.W. 3263 (1971).

Title VII. We find no such distinction in the hiring practices in those cases as contrasted with the practices in this case sufficient for us to reach a different result. Where, as here, the union members refuse to work with nonmembers who are working without union approval, the union in fact exerts effective control over employment in the trade by controlling membership and issuance of permits, notwithstanding contractual provisions purportedly permitting employment without regard for union membership or approval.

The principal justification advanced by the defendants for their opposition to the Ogilvie Plan was that it works at cross-purposes to, and would destroy, their four-year apprenticeship program and the standards of their trade.[13]

Apprenticeship programs in the construction trades have not produced many minority union members,[14] and the record in this case does not furnish any justification whatsoever for the interference by the defendants with the Ogilvie Plan.

The collective bargaining agreement dated August 1, 1969, between the SIEA members and Tri-Counties Council (governing Locals 169 and 480) provided for an apprenticeship program under a Joint Apprenticeship Committee

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[13] A similar argument was made that the so-called Philadelphia Plan interfered with the construction unions' practice of referring men from the hiring halls on the basis of seniority and that few minority tradesmen have high seniority. The argument was rejected and the plan approved in *Contractors Ass'n.* v. *Secretary of Labor*, 442 F. 2d 159, 172 (3rd Cir.), *cert. denied*, 40 U.S.L.W. 3165 (1971).

[14] Strauss & Ingerman, "Public Policy and Discrimination in Apprentices," 16 Hast. L. J. 285, 301-06 (1965); Kovarsky, "Apprentice Training Programs and Racial Discrimination," 50 Iowa L. Rev. 755 (1965); Boyce, "Racial Discrimination and the National Labor Relations Act," 65 N.W. U. L. Rev. 232, 242-45 (1970); Comment, "The Philadelphia Plan vs. The Chicago Plan: Alternative Approaches For Integrating the Construction Industry," 65 N.W. U. L. Rev. 642 (1970); Marshall & Briggs, *The Negro and Apprenticeship* (1967).

(JAC). Qualifications for selection include (1) completion of an application with references, (2) a complete physical examination, (3) completion of four years of high school or the equivalent, (4) passing of a written aptitude test, and (5) evaluation during oral interviews.

If all these barriers are successfully hurdled, the applicant goes on a waiting list. After the waiting period, if an applicant begins the apprenticeship program, he must attend school two nights a week or 144 hours a year for four years.

At the time of trial, the JAC of the Tri-Counties Council (including Locals 169 and 480) had 119 apprentices, of whom five were black. No black apprentice had ever graduated from the program.

Local 480 had 22 apprentices, none of whom was black. Local 169 had 14 apprentices, five of whom were black and one of whom was a Spanish-American.

William Dandridge, a black applicant for apprenticeship with some six or seven years of carpentry experience, scored highest of 41 applicants on the apprentice waiting list. From April to December 1970, he tried without success to obtain work through Local 169. No apprentices were sent out by 169 during that period. After the complaint was filed in this case, he obtained work through Local 480 at the low beginning-apprentice rate. His four years of schooling had not yet begun.

The treatment accorded Dandridge, who had some prior carpentry experience, had been graduated from high school, had been honorably discharged from military service and scored higher than 40 other applicants in the apprenticeship tests, may be compared with the experience of some of the white members of Local 169. Kenneth Shelby had an eighth-grade education and became a jour-

neyman member at the age of 17, whereupon he was paid the full journeyman's rate. His father and uncle were members of Local 169. He was not required to serve any apprenticeship. Donald Sanftleben became a full journeyman member of Local 169 at the age of 18 without any apprenticeship. His father and uncle were members of the Union. Salvador Spicuzza became a full journeyman carpenter in 1970 without any apprenticeship and with only two years' prior experience.

From 1960 through 1970, Locals 169 and 480 initiated a total of 62 members who had no apprenticeship training and less than four years' prior experience. Three of these 62 were black members.

It is obvious and uncontradicted on the record that the JAC apprenticeship program does not serve the same function as the Ogilvie Plan was intended to perform. Its existence does not justify the defendants in obstructing the operation of the plan. No member of a minority race has ever become a journeyman member of Locals 169 or 480 through their apprenticeship program.

Defendants made the argument that the question was not white versus black, but was "which blacks." The record shows that the Union was instead trying to control "how many blacks." This it cannot do under the 1964 Civil Rights Act.

IV

The district court should fashion appropriate affirmative relief, beginning with a permanent injunction prohibiting discriminatory practices in general terms and specifically prohibiting interference with the rights of black persons to work in the carpentry trade. It should retain jurisdiction, possibly with provisions for intermediate reporting

by the defendants. See, for example, the order entered in *United States* v. *Plumbers Local* 73, 314 F. Supp. 160, 164-67 (S.D. Ind. 1969).

The decree should enjoin the defendants and their members from engaging in or encouraging strikes, work stoppages or other interferences with implementation of the Ogilvie Plan or any other plan or training program having the purpose of correcting the effects of racial discrimination in the carpentry trade. The decree should direct the defendants to issue permits to black persons trained pursuant to the Ogilvie Plan and to all other black carpenters hired by employers in the same manner as they issue permits to white persons.

The district court should consider, in view of any further evidence he may wish to hear, the requirement of improvements in the hiring hall referral system, possibly on a first-in, first-out basis as ordered in *United States* v. *Plumbers Local* 73, *supra* at 165-66.

The judgment of the district court is vacated; this case is reversed and remanded for further proceedings consistent with this opinion.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

February 8, 1972

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Sr. District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

No. 71-1389

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 169, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Illinois

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be and the same is hereby denied.

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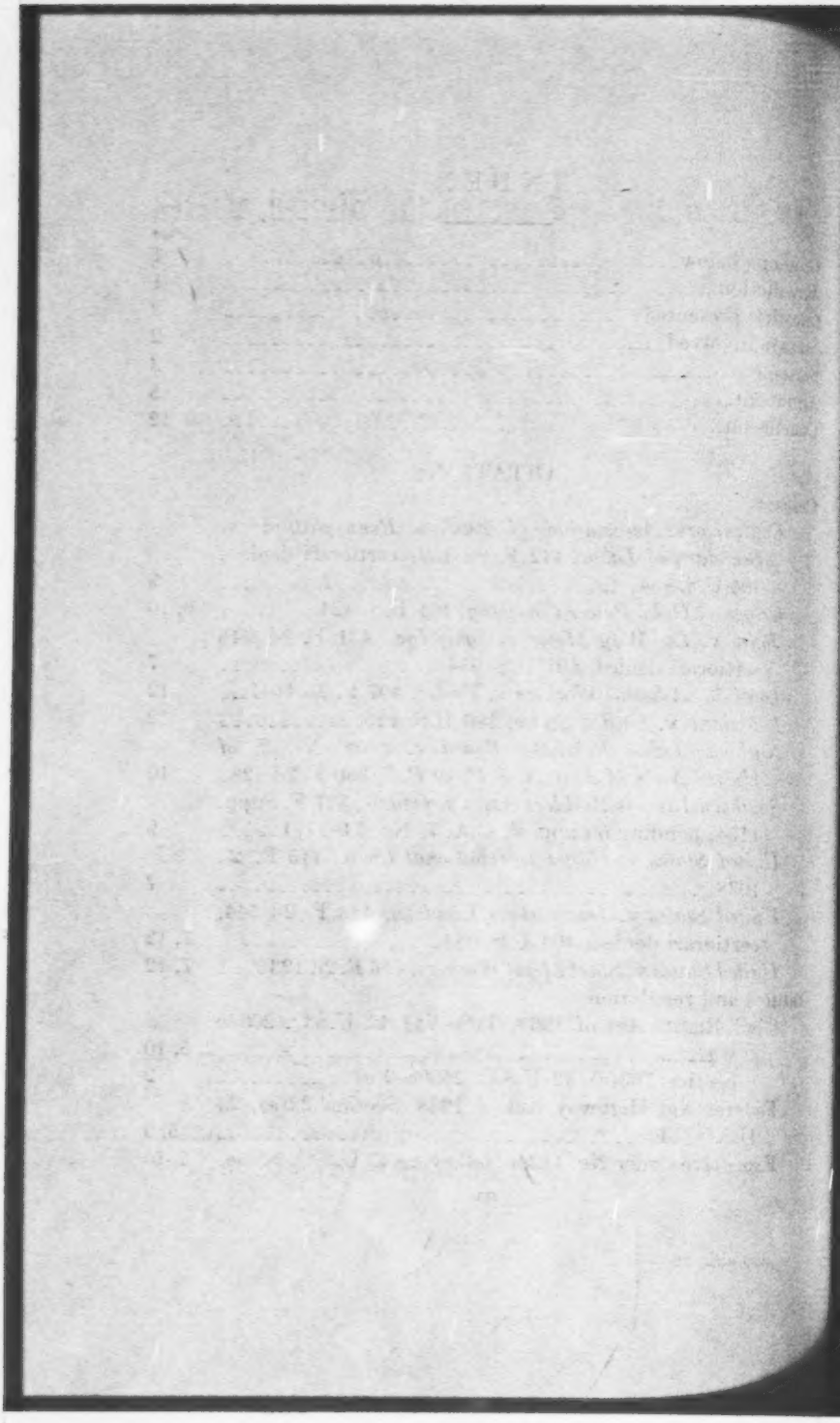

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1685

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 169, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23–41) is reported at 457 F.2d 210. The opinion of the district court (Pet. App. 1–22) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1972, and a timely petition for rehearing *en banc* was denied on February 8, 1972. On April 24, 1972, an order was entered extending the time to file a petition for a writ of certiorari until June 26,

1972. The petition was filed on June 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner union, which had traditionally discriminated against blacks, should be enjoined under Title VII of the Civil Rights Act of 1964 from calculated interference with the hiring of minority trainees pursuant to a voluntary, government-sponsored training program, and required to correct its discriminatory practices.

STATUTE INVOLVED

In addition to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), set forth at Pet. 2–3, also relevant is Section 703(c), 42 U.S.C. 2000e–2(c), which provides in pertinent part:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership [or applicants for membership], or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

STATEMENT[1]

1. Local 169, one of the petitioners herein, operates primarily in East St. Louis, Illinois, and has approximately 550 members, of whom 39 (or 7 percent) are black (Pet. App. 27–28). Blacks compose approximately 69 percent of the population of East St. Louis. Until 1948, Local 169 had no black members. Ten of the black members admitted since 1948 transferred from other carpenter locals (Pet. App. 9, 28). White journeymen members of Local 169 worked more hours for employers covered by the collective bargaining agreement[2] than did black journeymen (Pet. App. 28). The union's referral system is wholly subjective, and the union official in whose discretion was vested the operation of the informal referral procedure had expressed his preference for first referring white

[1] The evidence in the record is largely uncontradicted. Petitioners do not challenge the factual findings made by the district court and recited by the court of appeals.

[2] Based upon union health and pension fund records, it appears that white journeymen averaged 17% more hours worked than did black journeymen. The petitioners submitted no contrary evidence, but attacked the figures as being incomplete, since they did not reflect hours worked for other employers, such as municipal governments (see Pet. 15–16; Pet. App. 10, 28). There was, however, no evidence that proportionately more black members were self-employed, or employed by municipalities; in any event, the pension records reflected the work under the jurisdiction of the union which was the only matter in issue.

members of the union to jobs (see Pet. App. 29). In addition, black carpenters who sought "work permits" (which would enable them to obtain work from employers covered by the collective bargaining agreement) were repeatedly refused such permits because of the union's racially discriminatory policy in the issuance of work permits (see Pet. App. 30).

Although the Joint Apprenticeship Committee of the Tri-Counties Carpenters Council (which included Locals 169 and 480) had operated an apprenticeship program for many years, no black apprentice had ever graduated from the program to become a journeyman carpenter (Pet. App. 39). Local 169 had ostensibly selected sixteen blacks as apprentices (out of a class of 41) in 1970 before suit was filed, but none of them had been referred for work, nor had any begun their classroom instruction until this suit had started (Pet. App. 39; see, also, Pet. 18).

In the winter of 1969, in an effort to open the highway construction industry to minority persons in the East St. Louis area and to thaw a freeze of federal highway funds, the office of the Governor of Illinois, after extensive negotiations among local representatives of contractors, unions, the minority community, and appropriate federal agencies, drafted "An Agreement to Facilitate Equal Employment Opportunity in State Highway Construction in Madison and St. Clair Counties," commonly known as the Ogilvie Plan. After further negotiations and redrafting, the Plan was promulgated on June 3, 1970, and was signed by the contractors, the minority representatives, and two locals of the Teamsters union. The Laborers union

acquiesced in its implementation, and pursuant to consent decrees entered in suits brought by the United States, the cement finishers, ironworkers and operating engineers unions agreed to cooperate with the Plan. Although the carpenters union had initially agreed to cooperate with the Plan, it later announced its opposition.

The Plan contemplated a training program of up to 12 weeks and, upon successful completion of that course, a period of up to 200 days (approximately one construction year) of on-the-job training for those who were not yet up to journeyman skills, with pay at rates comparable to apprentices (Pet. App. 32).

When the first 15 black trainees graduated from the 12-week program on November 13, 1970, a contractor requested referral of a trainee from Local 169's union hall, and the trainees requested "permits." When the business agent, petitioner Rainbolt, refused both requests, the contractor hired two of the trainees. Although the collective bargaining agreement gave the employer sole discretion to hire anyone, the carpenters promptly walked off the job. Local 169 took several measures to insure that its men stayed off the job, and that no other workers went there (Pet. App. 32–34).

2. The present suit was brought by the Attorney General on behalf of the United States on November 25, 1970, alleging violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), and for interference with implementation of Executive Order 11246 and Section 22(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C. 140) requiring equal employment opportunities on federally assisted highway con-

struction projects. Defendants were Tri-County Illinois Carpenters District Council, Carpenters Local 169 and Carpenters Local 480, and their respective business agents (hereinafter "petitioners"). The complaint alleged that petitioners had engaged in a pattern or practice of discrimination against blacks with respect to union membership and employment opportunities (Pet. App. 1–4), and that petitioners had failed to cooperate with the implementation of the Ogilvie Plan and had engaged in a strike when black Ogilvie Plan trainees were hired by contractors (Pet. App. 4–5).

The district court issued a temporary restraining order enjoining petitioners from interfering with the Ogilvie Plan. After a hearing on the merits, the district court concluded that there was insufficient evidence to find that petitioners had engaged in racial discrimination, although it did find that several blacks had been denied membership and referral. The court also concluded that petitioners' interference with the Ogilvie Plan was not racially motivated (Pet. App. 20–21). Similarly, it found that, although petitioners operated a highly subjective and unreviewable referral system, and nepotism played a role in its operations, these practices were not racially motivated and therefore not unlawful under Title VII (Pet. App. 10–11).

3. The court of appeals unanimously reversed. Relying upon *Griggs* v. *Duke Power Company*, 401 U.S. 424, 432, the court of appeals held that the district court had erred in relying upon motive as the criterion for determining violations of Title VII (Pet. App.

30–31). The court found ample and undisputed evidence of racially discriminatory practices by petitioners in admissions to membership and issuance of permits, nepotistic practices, which in view of the small number of black members tended to limit the percentage of black members, and a referral system, which in view of the business agent's stated racial preference was likely to produce discrimination. Moreover, the racial statistics established a *prima facie* case of racial discrimination.[2] (Pet. App. 28–31.)

The court of appeals also ruled that the district court clearly erred in finding petitioners' opposition to the Ogilvie Plan to be "union versus non-union, but definitely not" racially motivated (Pet. App. 36). The court rejected petitioners' allegations that their opposition to the Ogilvie Plan was motivated by their desire to protect their apprenticeship program and that they willingly took blacks into their apprenticeship program. The court observed that no black apprentice had ever graduated from the apprenticeship program, which contained difficult "barriers" to admission and required a four-year period of apprenticeship during which the applicant must attend school for two nights a week. Moreover, between 1960 and 1970, Locals 169

[2] Use of statistics to establish racial discrimination in employment cases is well-settled, and has been approved by each appellate court that has considered the matter. *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 553 (C.A. 9), certiorari denied, 404 U.S. 984; *United States* v. *Sheet Metal Workers*, 416 F. 2d 123 (C.A. 8); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954; *United States* v. *Hayes International Corp.*, 415 F. 2d 1038 (C.A. 5).

and 480 admitted 62 members who had no apprenticeship training and less than four years prior of experience. Only three of these were black (Pet. App. 40–41). On this record the court of appeals held (Pet. App. 40):

> Defendants made the argument that the question was not white versus black, but was "which blacks." The record shows that the Union was instead trying to control "how many blacks." This it cannot do under the 1964 Civil Rights Act.

The court of appeals directed the district court to fashion appropriate affirmative relief, which is to include a permanent injunction prohibiting racial discrimination and specifically prohibiting interference with the rights of black persons to work in the carpentry trade. The district court's decree is to include a prohibition against the unions and their members from engaging in or encouraging interference with the implementation of the Ogilvie Plan, and a direction to issue permits to black persons trained pursuant to the Ogilvie Plan (Pet. App. 40–41).[4]

ARGUMENT

Petitioners' principal contention is that the court of appeals improperly held that "one can be found guilty of engaging in a pattern or practice of racial discrimination solely because he refuses to cooperate with a pet voluntary plan to which is is not" a party (Pet. 30). The de-

[4] The court of appeals also directed the district court to "consider the requirement of improvements in the hiring hall referral system, possibly on a first-in, first-out basis" (Pet. App. 40–41).

cision below did not, however, rest "solely" upon petitioners' refusal "to cooperate with a pet voluntary plan".

a. The Ogilvie Plan was adopted pursuant to the provisions of the Federal Highway Act of 1968. The Act provides that the Secretary of Transportation, prior to the approval of any projects under the Act, shall "require assurances from any State desiring to avail itself of the benefits of this chapter that employment in connection with proposed projects will be provided without regard to race, color, creed and national origin." The Act further provides that where the Secretary considers it necessary to assure equal employment opportunity he shall "require certification by any State desiring to avail itself of the benefits * * * that there are in existence and available on a regional, statewide, or local basis, apprenticeship, skill improvement or other upgrading programs * * * which provide equal opportunity for training and employment without regard to race, color, creed or national origin" (23 U.S.C. 140(a)). The Ogilvie Plan was adopted to provide this assurance to the Secretary of Transportation that employment in connection with proposed projects under the Act would be provided on a non-discriminatory basis.[5]

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[5] The lawfulness of the Ogilvie Plan itself is not challenged. The lawfulness of similar plans has been upheld. *E.g.*, *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854. The lawfulness of the Ogilvie Plan itself was sustained by another district court in a separate proceeding. *Southern Illinois Builders Ass'n* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill), pending on appeal, C.A. 7, No. 71-1771.

b. Petitioners did not simply fail to cooperate with the Ogilvie Plan. They engaged in unlawful economic coercion [6] in an effort to compel employers, who were willing participants in a plan that satisfied their obligation under Executive Order 11246,[7] not to comply with their commitments under the Plan. Moreover, the decision below was not based "solely" upon petitioners' unlawful strike activity. The court of appeals viewed that activity in the context of a pervasive and detailed pattern of discriminatory practices engaged in by Local 169.[8] Indeed, the court of appeals here found that the strike was racially motivated (Pet. App. 32–33).[9] Petitioners do not argue that the standards employed by the court of appeals were contrary to well established principles. They acknowledge "that policies and practices racially neu-

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[6] Since petitioners had by collective bargaining agreement vested in the employers the right to hire without regard to union membership or referral, and had agreed not to strike, but to settle all grievances by arbitration (Pet. App. 33), it is difficult to envision any theory under which the strike could be deemed a lawful one. See *National Labor Relations Board* v. *Local No. 2 of United Ass'n. of J. & A. of P. & P. I.*, 360 F. 2d 428 (C.A. 2).

[7] Executive Order 11246 requires contractors to take affirmative action in regard to equal opportunity employment, upgrading, recruitment and selection for training, including apprenticeship.

[8] This case, therefore, does not present the question whether a union which had conducted its affairs in compliance with Title VII could lawfully strike to prevent implementation of such a plan.

[9] Racial motivation is not, of course, a necessary component in a Title VII case, since Congress directed the thrust of the Act to the consequences of employment practices, not the motivation. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432.

tral on there face are, nevertheless, unlawful if they tend to perpetuate effects of past discrimination," that "[e]vidence of pre-act (Civil Rights Act of 1964) conduct is admissible to attempt to prove that present policies perpetuate the effects of past discrimination," and that "[p]reference in work referrals or in union membership to relatives of members of a union which has only white members may constitute a violation of the Act" (Pet. 23–25).

Petitioners, however, appear to suggest that they are not responsible for discrimination in hiring because they do not control employer hiring practices through the use of "an exclusive hiring hall where hiring could only be had through the union," (Pet. 25). But the record indicates that in practice Local 169 controlled employer hiring practices just as effectively as if it had a "hiring hall". As the court of appeals found (Pet. App. 3–8):

> * * * Where, as here, the union members refuse to work with nonmembers who are working without union approval, the union in fact exerts effective control over employment in the trade by controlling membership and issuance of permits, notwithstanding contractual provisions purportedly permitting employment without regard for union membership or approval.

Thus, by control over hiring and by discriminatory admission practices, detailed earlier and in the opinion below, Local 169 deprived minority group members of the right to earn a livelihood as carpenters in the East St. Louis Area. The unlawful strike that precipitated the present action was another effort to limit minority access to employment. In order to prevent further

discrimination and to eliminate the consequence of past discrimination, therefore, the court of appeals correctly directed the district court to enjoin petitioners' interference with the Ogilvie Plan and to require them to issue work permits to persons trained pursuant to the Ogilvie Plan and to all other black carpenters hired by employers in the same manner as they issue permits to whites. That such affirmative relief is appropriate is well established in this area. See *Louisiana* v. *United States*, 380 U.S. 145, 154; *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553 (C.A. 9), certiorari denied, 404 U.S. 984; *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123, 131 (C.A. 8); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1052–1053 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1971

No. _____

JAMES BROWN HARDY,
ACTING WARDEN OF THE MARYLAND STATE PENITENTIARY,
Petitioner,

v.

MILAN M. VUITCH, M.D.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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